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Ontario
Labour Relations
Board

Government
Publications

Decisions

November 84

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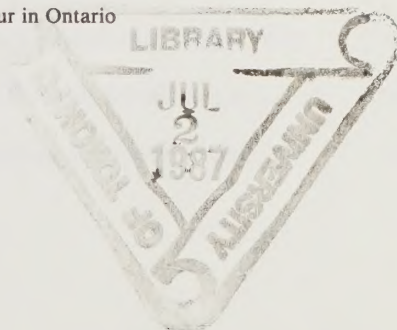
**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1984] OLRB REP. NOVEMBER

EDITOR: NIMAL V. DISSANAYAKE

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Typeset, Printed and Bound by Union Labour in Ontario



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1659-84-U Ralph Albrecht, Complainant, v. Labourers International Union, Local 607, Respondent

Duty of Fair Referral — Unfair Labour Practice — Complainant seeking out-of-work list for extended period of time to manually copy names and phone numbers of everyone ahead of him — Denial of request not breach of referral duty in circumstances — Board clarifying application of duty to access to hiring hall records

BEFORE: S. A. Tacon, Vice-Chairman.

APPEARANCES: *Ralph Albrecht for the complainant; David Strang, Pat Little and Phil Harris for the respondent.*

DECISION OF THE BOARD; November 23, 1984

I

1. This is a complaint alleging violation of section 69 of the *Labour Relations Act*.
2. At the hearing, the respondent moved for dismissal of the complaint for failure to particularize the allegations. The Board explained Rule 72 of the Rules of Practice to the complainant who was not represented by counsel. The complainant asserted that he had been treated unfairly by the union with respect to employment referrals. In particular, on one occasion when he had attempted to review the out-of-work list and write down the names of individuals ahead of him he had been prevented from doing so. The complainant also alleged that a Mr. St. Onge had been referred to a three-month job in Quebec and then almost immediately thereafter was referred to a position on a pipeline project. The complainant questioned this referral while he was not referred to jobs during this period. The respondent indicated the union was prepared to deal with the complaint as particularized without delay and the hearing proceeded.

II

3. There was no dispute that the respondent operated a hiring hall with respect to several collective agreements in force at the time of the alleged violations of section 69 of the Act and that the complainant was a member of the respondent union.
4. The complainant testified on his own behalf. P. Little, the business manager, E. Belanger, the secretary/bookkeeper, and P. Harris, testified on behalf of the union. The Board has considered the usual factors in assessing the credibility of witnesses, including the consistency of their evidence, the firmness of their memory, their demeanour while testifying, their responses in cross-examination, their apparent ability to resist the influence of interest to modify their recollections and what appears to the Board to be reasonably probable when the circumstances and the testimony of the witnesses are considered. In view of those assessments, the Board makes the following findings of fact.
5. The union operates a hiring hall whereby members are referred to work according to their seniority on the out-of-work list, i.e., the length of time they have been unemployed, subject to possessing the appropriate qualifications for the job order. There are over seventy

classifications or skills listed on the registration card. Members check-off those qualification or skills which they possess. The referrals are generally made by the office staff, including Davis and Belanger; Little seldom refers members to jobs and is not normally consulted on referrals. When a member is laid off, he registers for work at the union office, in person or by telephone. His registration record is inserted, qualifications side up, in the bottom spot in the out-of-work list. The "list" is actually a ring binder filled with the registration cards of out-of-work members. The binder is subdivided into months for easy reference and, in periods of high unemployment, may consist of two or three binders. A separate section of the binder is maintained for members outside the union's jurisdiction but who pay dues. These members are not called until all members within the jurisdiction have been contacted or are employed or do not have the necessary skills. Another section consists of members on compensation or other forms of leave or who are unable to work but are not receiving benefits. These members "work their way through the list" but if they reach the top but are still unable to work, their position is maintained in a special section until medically fit once more. The individual's dues card is cross-referenced at the time he signs in with the date of registration for easy cross-reference to the binder. In this way, an individual, by phone or in person, can readily be informed of his position on the out-of-work list. When an individual is referred to a job, the registration card remains in the same position for ten days and, if the individual is still employed, the card is removed from the binder and reinserted at the bottom when the member again registers as laid off. The union maintains a telephone log and work order booklet as well. The hiring hall rules were entered as an exhibit; the complainant acknowledged he had a copy at home.

6. For every phone call, the call is recorded in the telephone log; the time, caller, subject matter and brief details, if it is a job request, are noted. Work orders are also noted, more fully, in the work order sheet, a copy of which is retained by the union. The union staff then start at the front of the out-of-work list and contact the first person having the appropriate qualifications. The member is given the details of the job and offered the position. A member is entitled to refuse a position, without penalty, for a legitimate reason, e.g., medical problem. Otherwise, a refusal is charged against the individual. Two unanswered telephone calls on the same day for the same position are counted as one refusal. After three refusals, the person's card is removed from its position and placed at the bottom of the list. Members commonly obtain non-union work on their own and are not penalized for doing so although a refusal to accept a union referral would be counted in the usual way. Union records would not indicate non-union employment, nor would the union know in any "official" way if a member was working outside the local's jurisdiction. This system of referrals was implemented roughly two years ago.

7. During the past two years, the numbers of unemployed union members has been extremely high: the out-of-work list filled three binders. Conditions improved significantly in the Summer 1984 season (primarily because of the Hemlo site but also because of increased construction generally in the western area) to the point where all members had been offered positions for which they were qualified. The current out-of-work list dated from August 1984 and the level of unemployment has gradually increased to the point where a second binder has been started. New members have been initiated throughout this period but particularly in connection with the organizing at the Hemlo site. Initiation fees are reported separately on the union's monthly financial statement and read out at the membership meetings. Members in attendance can query the reason for the initiations (e.g., organizing, new members with special skills in particular demand like diamond drillers etc.).

8. The complainant has been a member of the respondent union for thirteen years. Each time he was laid-off, either he or his wife would sign in at the union office. Over the past four

or five years, the complainant has worked approximately five or six months per year and in the past two years has only been referred through the hiring hall to positions lasting roughly six weeks. After a job with Ontario Hydro in January 1984, the complainant worked in Snow Lake, on a non-union job, for approximately five weeks until a medical problem prevented him from working underground. The complainant collected weekly indemnity from July to mid-September 1984. In September, he was again able to work underground. He obtained a job with McIsaac September 18th and, thus, refused the referrals from the union in September and October. The complainant is still employed at McIsaac.

9. The complainant's registration card showed the following work record through the union:

- registered as out-of-work as of November 19, 1982;
- worked for Cliffside in October 1983 but for less than 10 days and, thus, his place on the list was not affected;
- worked for Ontario Hydro in January 1984;
- re-registered on the out-of-work list as of March 26, 1984;
- called on August 9, 1984 re: a position as a driller, position declined as still on weekly indemnity and, thus, not counted as a refusal;
- called on September 27th but already working elsewhere and declined job; counted as a first refusal;
- called on October 1st, still working elsewhere; counted as a second refusal;
- called on October 3rd on two occasions re: the same job but no answer; counted as third refusal.
- registration record moved from placement on out-of-work list as of March 26, 1984 to October 3, 1984.

10. The complainant has had several conversations with Little. The complainant's recollection of events was rather vague as to details and generally the disparity between the complainant's version and that of Little may be attributed to the differing ability of individuals to recall events occurring several months ago. Where there is conflict, however, the testimony of Little is preferred.

11. The first conversation dealt with the complainant's assertion that he had been out of work for some time and felt, as a long-time union member, he should be referred to jobs before others who had more recently joined the union. Little explained that the hiring hall rules calculated seniority in referrals according to the time on the out-of-work list (subject to qualifications), rather than length of time in the union. Other conversations also dealt with the length of time the complainant had been out of work. Little's response, essentially, was that most of the members were in a similar position because of the recession. Little also told the complainant that, although he may be 100th overall on the list, he should actually count

his position in terms of those classified as “driller”, for example. “Driller” was one of the classifications for which the complainant was qualified. The Board does not find the complainant’s allegation that Little maintained a separate drillers’ list to be substantiated. The Board also does not accept the complainant’s assertion that Little said he [Little] could “pick and choose” who went on what jobs, meaning an arbitrary or discriminatory selection without regard to seniority on the out-of-work list and qualifications.

12. The complainant made arrangements with Belanger to see the out-of-work list on a particular Friday in Spring 1984. The complainant was accompanied by a Peter Collins, another union member. Belanger brought out the binder opened to the complainant’s card. The complainant commenced writing the names and telephone numbers of those members ahead of the complainant in the binder. The dispatchers and Belanger had been instructed to permit members to examine the out-of-work list but not to leave anyone alone with the binder to prevent the list from being altered by simply rearranging the cards. Such alteration of the list would not likely be detected. The union’s policy is to permit ready access to the out-of-work list by members without special arrangements or procedures provided, of course, one of the office staff is free to monitor the review. Belanger informed Little that the complainant was writing out the names and telephone numbers of all individuals ahead of him in the binder. This would take a considerable period during which time she could not perform her other duties. At this point the “list” comprised three binders.

13. Little then told the complainant that he was entitled to see the list provided the request was reasonable and offered to help with any specific problem. The complainant replied that he just wanted to know where he was on the list. Little reiterated his offer of assistance but stated the complainant could not monopolize the out-of-work list as the binder was needed for referrals. The complainant did not reply and continued writing. Finally, Little removed the binder but again stated that the complainant could examine the book in a reasonable fashion at any time. The complainant then left the union office. Collins remained to examine the binder for some time before also leaving.

14. After this Friday incident in the Spring of 1984, the complainant did not try to examine the list again or make other inquiries about the referral system. Further, the complainant did not attend union meetings and raise the matter there.

15. The registration card of St. Onge indicated the following:

- unemployed since November 21, 1983;
- called by the union on August 2, 1984 but had no experience on wire and sort; not counted as a refusal;
- called by the union on August 9th but working elsewhere; counted as a first refusal;
- called by the union on August 14th, but not available; counted as second refusal;
- called by the union on August 20th, but not available; counted as third refusal;

- card moved from registration on out-of-work list as November 21, 1983 to August 20, 1984;
- called by the union (Harris) on September 12, 1984 and offered job as a powderman with Hamlyn, a subcontractor on the pipeline job.

With respect to the Hamlyn job, the normal procedure for referral was followed, i.e., the out-of-work list was reviewed in order of seniority on the out-of-work list and St. Onge was the first on the list qualified as a powderman. As to the Quebec job, the evidence indicated that St. Onge held a supervisory position (which would have been outside the bargaining unit in any event). Further, the job was not the result of a union referral.

III

16. The complainant stated he felt he had been treated unfairly, that he had been out of work for so long and that others had been referred more often and/or to better jobs. The complainant acknowledged that he hadn't realized that the Quebec job held by St. Onge was outside the respondent's jurisdiction. He conceded he was wrong in this allegation of unfairness and admitted he knew of no other individual who had been referred to jobs to which he felt he was entitled. The complainant requested that the Board order easier access to the list or some arrangement, such as a cage, to allow longer review of the cards.

17. The respondent sympathized with the complainant's frustration at being unemployed for so long but stated that large numbers of members were in similar circumstances. The respondent understood the complainant's desire to review the out-of-work list and even file a complaint with the Board to ensure he was being fairly referred to jobs. However, the complainant should also have pursued internal routes such as raising the matter at union meetings. In any event, no violation of section 69 had been made out.

18. Counsel for the respondent urged the Board to go on to consider the general question of access by members to out-of-work lists. It was submitted that the respondent, Local 607, a relatively small local servicing a large geographic area, had established a fair system to refer members to jobs covering a wide range of skills. Union policy was to provide access by members to the out-of-work list on a drop-in basis subject to one of the office staff being available to monitor the review of the binder. Such monitoring was necessary to prevent alteration of the list and yet placed an additional burden on an already busy office. The individual member's right to access should, however, be balanced against the union's legitimate concern with avoiding a financial drain on its resources (through a need for extra staff to monitor and/or provide copies of the list) and its institutional concerns with preventing duplication of the list, including telephone numbers, which may be used as the basis for raids by other unions. In this case, counsel asserted the limits placed on access by the local were reasonable. This concern with balancing right of access with reasonable limits imposed by the union was heightened where the union was presented with vague allegations of wrongdoing lacking sufficient particulars to enable the union to prepare a response efficiently. The Board certainly has wide remedial authority to order access where a violation of the Act had been found. Further, the Board possessed authority to subpoena documents where a complaint had been filed and revealed a *prima facie* breach of the Act. However, it was submitted the Board should be wary of adding to a member's contractual rights (beyond the union's constitution, by-laws, hiring hall, rules, etc.) to establish broader rights of access to hiring hall lists because of the serious impact of such unfettered rights on the functioning of the hiring hall, the union's constitutional concerns

and financial resources. If the Board's jurisprudence (*Joe Portiss*, [1983] OLRB Rep. July 1160; *Luciano D' Alessandro*, [1983] OLRB Rep. Oct. 1699 and *Maurice Berlinguette*, [1984] OLRB Rep. Apr. 568 were cited) established such an unfettered right, counsel submitted the Board had gone too far.

IV

19. Section 69 of the Act reads:

Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

20. The hiring hall was usefully reviewed in the following passage from *Joe Portiss*, *supra*:

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls In The Maritime Industry. Sub-Committee On Labour Management Relations Of Senate Committee On Labour And Public Welfare*, 81st Cong. (2d) ses. 100-01 (1950) and Bastress, "*Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls* [1982] *West Virginia Law Review* 31). If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvas numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force

with greater experience and sophistication, which will also benefit the employer.

8. To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall system effectively vests in those union officers powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

9. The advantages of the hiring hall system and the potential for their abuse were well summarized by Professor Bastress in the following passage at page 31:

The union hiring hall has been one of the major developments in twentieth century labor relations. It has provided many industries with a means of efficiently matching unemployed workers with job vacancies and has replaced a system of haphazard, unjust, and corrupt employment practices. Yet it has also developed substantial problems of its own. A hiring hall is fraught with potential for abuse, and, indeed, that potential is all too frequently realized. The largely unreviewable discretion of union business agents and inadequate protection for workers can combine to make hiring halls a mixture of whim, nepotism, prejudice and irrationality.

10. Unfortunately Canada labour relations have not been without some degree of abuse, albeit exceptional, in the hiring hall system. (See, Robert Cliche, Brian Mulroney, Guy Chevette, *Report of the Commission on the Exercise of Union Freedom in the Construction Industry, Quebec*, (1975); Waisberg, *Report of the Royal Commission on Certain Sectors of the Building Industry*, ("The Waisberg Report") Ontario, (1974) at pp. 326-28; see also the recent decision of the Supreme Court of Canada in *Nauss v. Halifax Longshoreman's Association, Local 269*, 83 CLC ¶14,022 (S.C.C.)).

21. In this case, however, the Board finds there has not been abuse of the hiring hall with respect to the complainant's allegations. The respondent has established an apparently efficient system of matching members' skills with work orders in order of seniority on the out-of-work list. On the evidence, the respondent has established, published hiring hall rules to refer individuals to jobs. The system appears to work well despite the difficulties of covering a wide geographic area (with preference for members within a certain radius of job sites) and dealing with a complex classification system (i.e., over seventy qualifications or skills are categorized). The complainant could not cite a single instance (except St. Onge) where another member had been referred to a job which he felt he should have received (either by naming an individual

on a job site). With respect to St. Onge, the complainant acknowledged at the end of the hearing, and the Board concurs, there was no violation of section 69.

22. The complainant was not denied access to the out-of-work list at any time. He *was* denied the right to monopolize the list for an extended period of time in order to manually copy the names and telephone numbers of all individuals ahead of him on the list. In the circumstances, the Board does not find this to be an unreasonable denial of access. Specifically, the respondent was properly concerned with monitoring the binder so as to prevent a virtually undetectable alteration of the out-of-work list. This monitoring — if access was permitted for extended periods of time — would place an unreasonable burden on the union's resources. That is, either additional staff would be needed or the present staff would be prevented from attending to their other responsibilities. And, most importantly, members could not be dispatched to jobs while the list was being reviewed. The Board also notes that the complainant did not seek to review the list after the "Friday" incident nor did he raise the question of access at membership meetings. Moreover, it must be stressed that the complainant did not approach the respondent with a specific problem or example of allegedly unfair referral (either in terms of a named individual who was referred or a job site). Rather, the complainant merely sought to review the list in a manner which would result in considerable strain on the union's resources (as detailed above) without disclosing any reason for the review and without responding to offers of assistance to resolve any particular difficulty.

23. The Board is very sympathetic to the complainant's position. He has been out of work except for a brief period through no fault of his own for two years. His frustration and sense of unfairness is understandable. That he should wish to review the out-of-work list to ensure the union was fulfilling its statutory duty of fair referral is not only understandable, it is his right. However, the union's response to the manner in which he sought access was not unreasonable. Beyond this incident, the complainant did not substantiate his vague allegations of unfair referrals. The Board hereby finds that the union has not violated its obligations under section 69 of the Act with respect to the complainant.

V

24. While this finding is sufficient to dispose of the complaint, the Board is prepared to offer some further comments in view of the respondent's submissions and request for guidance. It was not disputed that the Board has wide remedial authority to respond to violations of the Act. With respect to violations of the duty of fair refusal, an appropriate remedy may detail the type of access to which a complainant — and other members — are entitled. It may also be appropriate to order that copies of out-of-work lists be available, that hiring hall rules be reviewed, etc. But it is critical to remember that these remedies are fashioned to deal with the particular circumstances founding a violation of the Act. The remedies in *Portiss, supra*, described by that Board as "far reaching", were intended to respond to the established wrongdoing in that case and not to set the Board's standard for compliance with the duty under section 69 of the Act.

25. The respondent's general concerns about access are probably best focussed in the Board's comments in *Berlinguette, supra*, at paragraph 16:

16. At the hearing of February 23, 1984, the Board indicated it was not prepared to rule that a refusal of information could not be a breach of section 69. On further reflection, the Board is now satisfied that a refusal of

information *will* be a violation of section 69 *if* the refusal is arbitrary, discriminatory or in bad faith. This is so whether or not the information sought would have revealed some other violation of section 69. This does not mean that a union must comply with any and every request for information, regardless of the scope of the request, the sensitivity of the information sought, or its relevance to the interests of the person making the request. That person's interests must be balanced against the individual and collective interests of the other persons for whom the union seeks employment opportunities. *Prima facie*, however, such individuals have a legitimate interest in knowing both the results of referral decisions and the information taken into account in making those decisions. The strength of that interest, and of any competing interests, will depend on the facts. It is for the trade union to strike the necessary balance. The Board's approach to a complaint that the result is improper will be the same as in other cases under sections 68 and 69: the onus will be on the complainant to show that the trade union's action is arbitrary, discriminatory or in bad faith.

26. The above passage in *Berlinguette* does not create an absolute "right to information" for each union member so that a refusal of information must be justified by the union as not arbitrary, discriminatory or in bad faith. The same passage speaks of the need to balance the interests of the individual seeking information against the individual and collective interests of other members. Further, the paragraph reaffirms that the complainant bears the onus in section 69 (and 68) complaints.

27. The passage is couched in terms suggesting a right to information, namely, "a refusal of information *will* be a violation of section 69 *if* the refusal is arbitrary, discriminatory or in bad faith". However, what the Board was responding to in *Berlinguette* was the respondent's argument in that case that a refusal of information, specifically, a denial of access to hiring hall records, is not a violation of section 69. It cannot be seriously asserted that the Board should permit section 69 to be emasculated by acknowledging, in effect, a broad right of a union to cloak its activities in secrecy. The focus, in *Berlinguette*, then, was on preventing a union from insulating itself from section 69 complaints through a denial of access to hiring hall records, rather than on "creating" a new right.

28. As stated above, this complaint is hereby dismissed.

2106-83-R;2141-83-R United Brotherhood of Carpenters & Joiners of America Local 1256, Applicant, v. Ben Bruinsma and Sons Limited, Respondent, v. Construction Workers Local 53, CLAC (formerly known as Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada), Intervener; International Union of Operating Engineers, Local 793, Applicant, v. **Ben Bruinsma and Sons Limited**, Respondent, v. Construction Workers Local 53, CLAC (formerly known as Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada), Intervener

Bargaining Unit — Construction Industry — Practice and Procedure — Voluntary Recognition — CLAC certified for all employee unit in single Board Area — Collective agreement extending to cover other areas where no employees employed — Whether employer support rendering voluntary recognition void — Whether applicant craft unions entitled to carve out their crafts by way of displacement

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *M. A. Church, D. Chappell and J. MacDowell for United Brotherhood of Carpenters & Joiners of America Local 1256; M. A. Church, E. Ford and J. Mihalich for International Union of Operating Engineers, Local 793; D. K. Robinson, Q.C., and A. Bruinsma for the respondent; W. R. Herridge, Q.C., Henk De Zoete and Paul Dodds for the intervener.*

DECISION OF THE BOARD; November 7, 1984

1. These are two applications for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*. Both applications relate to the industrial, commercial and institutional sector of the construction industry (the “ICI sector”). In File No. 2106-83-R the United Brotherhood of Carpenters & Joiners of America Local 1256 (the “Carpenters Union”) is seeking to be certified as the bargaining agent for a unit of carpenters and carpenters’ apprentices. In File No. 2141-83-R, the International Union of Operating Engineers, Local 793 (“the Operating Engineers’ Union”) is seeking to be certified for a unit of equipment operators employed by the respondent.
2. The respondent is a general contractor based in Chatham in Kent County. Most of the respondent’s work is performed within the Counties of Essex and Kent. However, from time to time the respondent also performs work in other counties. At the time of the filing of the two instant applications, the respondent was engaged on a job in Sarnia in Lambton County.
3. Construction Workers Local 53, Christian Labour Association of Canada (“CLAC”) has intervened in both proceedings. Although it is active in the construction industry, unlike the two applicant unions, CLAC is not a craft union. Accordingly, it is unable to take advantage of the provisions of section 6(3) of the Act which provide that where a craft union applies to be certified for unrepresented employees belonging to its craft, the Board is required to find the unit to be appropriate. In instances where CLAC and other similar unions apply to be certified in the construction industry, the Board generally defines the bargaining unit with reference to many of the same principles as are applied outside of the construction industry.

In particular, the Board will generally describe the bargaining unit so as to encompass a number of different trades or classifications. Prior to 1966, such bargaining units were generally described in terms of “all employees” of a particular employer. However, having regard to the special vulnerability of the construction industry to jurisdictional disputes, in 1966 the Board changed its practice and began to describe such bargaining units by reference to the trades actually employed by the employer on the date of the making of the certification application. (See *Winter and Son Limited*, [1967] OLRB Rep. Oct. 889, and Board Practice Note No. 11). In 1963 CLAC was certified by the Board to represent employees of the respondent in the Board’s geographic area #1, i.e. the Counties of Essex and Kent. Given that the certification occurred prior to the 1966 change in policy referred to above, the bargaining unit was defined by the Board to include “all employees” of the respondent. The actual description of the bargaining unit read as follows:

“all employees of the respondent employed in the Counties of Essex and Kent, save and except foremen, persons above the rank of foreman and office staff.”

4. On or about November 30, 1967 CLAC and the respondent entered into a first collective agreement. The recognition clause of the agreement did not utilize the language of the Board certificate. In particular, the recognition clause, which is set out below, contained no geographic limitation:

“The employer recognizes the union as the exclusive bargaining agent for its employees, other than:

a) employees having a supervisory or confidential capacity or having authority to employ, discharge or discipline employees;

b) office and sales staff.”

Subsequent collective agreements entered into between CLAC and the respondent contained recognition clauses which utilized the same language. A collective agreement with such a recognition clause was in effect at the time of the filing of the two instant applications. The collective agreement did not, however, serve as a bar under section 5(4) to the two instant applications since both applications were filed within the last two months of the operation of the agreement.

5. The Carpenters’ Union and the Operating Engineers’ Union are both bound by the statutory scheme of provincial bargaining in the ICI sector. Section 144 of the Act mandates that with respect to the ICI sector they must apply to be certified for province-wide bargaining units. In the instant case, both unions contend that such a unit can encompass all of the province *except* for Essex and Kent Counties, which is where the respondent carries on most of its operations. In support of this contention, the applicants submit that notwithstanding the scope clause of CLAC’s collective agreement with the respondent, CLAC’s bargaining rights in fact relate only to Essex and Kent Counties. On the basis of this submission, the applicants contend that they are each entitled to apply to be certified for a unit of unrepresented employees that is essentially province-wide in scope, but which excludes Essex and Kent Counties where CLAC holds bargaining rights. If the applicants are correct in this regard, then their right to be certified would be tested only among employees engaged outside of the respondent’s main center of operations in Essex and Kent Counties. At the time that the two applications were filed, the

only employees working for the respondent outside of Essex and Kent Counties were employed on the job in Sarnia that has already been referred to.

6. The respondent and CLAC take the position that CLAC's bargaining rights are province-wide in scope. Based on the Board's general practice in displacement applications of not altering the geographic scope of an existing bargaining unit, CLAC contends that any bargaining units the Board might fashion in these proceedings should also be province-wide in scope, inclusive of Kent and Essex Counties. If this submission is adopted, then the right of the applicants to be certified would have to be tested among employees in all parts of the Province. Further, even if an applicant had filed membership support on behalf of more than fifty-five per cent of the employees in a bargaining unit found to be appropriate for collective bargaining, given the Board's long-standing practice of holding representation votes in displacement applications, the Board would likely not certify the applicant outright but rather direct the taking of a representation vote in which employees would be asked to indicate whether they desired to be represented by the applicant union or by CLAC.

7. As one of the arguments in support of their contention that CLAC's bargaining rights are limited to the Counties of Essex and Kent, the applicants submit that although the relevant collective agreement has a geographically unrestricted recognition clause, when the document is considered in its entirety it is evident that the agreement is in fact meant to cover only the Counties of Essex and Kent. After hearing the evidence and the representations of the parties with respect to this one issue, the Board, on March 21, 1984, issued a decision in which it concluded that the collective agreement does, in fact, purport to cover all of the Province of Ontario. (See, [1984] OLRB Rep. Mar. 404.)

8. The two applicants also take the position that, as a matter of law, the collective agreement between CLAC and the respondent cannot cover all of Ontario, and that instead it is binding only in the two counties for which CLAC was certified, namely, Essex and Kent. Counsel for the applicants contends that it was legally improper for CLAC after it had been certified to represent employees in only one Board area to then enter into a collective agreement covering all of Ontario. Counsel notes in this regard that at the time the bargaining unit was extended it was unlikely that the respondent had employees in any of the Board's geographic areas other than area #1. Counsel also relies on the fact that in these proceedings CLAC led no evidence to establish that at the time the extension to the bargaining unit was agreed to, it represented a majority of the respondent's employees and that, in particular, it led no evidence to establish majority support among the respondent's carpenters and equipment operators. Because the two applicants are bound by the scheme of provincial bargaining, they are required to obtain bargaining rights for the ICI sector on a province-wide basis. In the view of the applicants, in that it is not open for the applicants to be certified for one Board area with respect to the ICI sector and then later enter into a collective agreement covering the entire province, the same restriction should also apply to CLAC.

9. In assessing the positions put forward by the applicants, it must be kept in mind that while the *Labour Relations Act* sets out a detailed process by which unions can acquire bargaining rights by way of certification, section 16(3) of the Act expressly recognizes that a trade union may also acquire bargaining rights by way of a voluntary recognition agreement with an employer. Subject to certain safeguards for employees which will be referred to later, the Act puts very few restrictions on trade unions and employers who wish to enter into voluntary recognition agreements. In particular, with one exception, the Act places no restrictions on the geographic scope of a voluntary recognition agreement. The exception is to be found in

section 144(4) which provides that unions bound by the scheme of provincial bargaining can only enter into voluntary recognition agreements in the ICI sector which are province-wide in scope. Further, there is nothing in the Act which prevents a trade union that has been certified by the Board with respect to a limited geographic area from entering into a voluntary agreement with the employer to expand the geographic scope of the unit. We believe we can take notice of the fact that the alteration of the geographic scope of bargaining units following certification has been a fairly common practice in the construction industry. Prior to the advent of province-wide certification in the ICI sector, such alterations were particularly common as parties altered the geographic scope of bargaining units set by the Board in order to make them conform with the different geographic jurisdictions of trade union locals. Other past alterations of certified bargaining units have, however, been much more extensive, including the extension of bargaining units to encompass the entire province. It is noteworthy that in 1979, when the Legislature decided that the scheme of provincial bargaining should bind all employers on a province-wide basis, even in instances where a trade union had bargaining rights for an employer in only one part of the Province, it did so by enacting section 137(2) of the Act which deems such an employer to have voluntarily recognized the union on a province-wide basis. As noted earlier, trade unions bound to the scheme of provincial bargaining can now only enter into voluntary recognition agreements with respect to the ICI sector which are province-wide in scope. Further, there is nothing in the Act which prohibits these unions from being certified to represent an employer's employees in the non-ICI sectors in a single Board area, and then by way of a voluntary recognition agreement with the employer to expand the unit to encompass the entire province.

10. If a trade union that has been certified for one Board area subsequently enters into a collective agreement with an employer covering a broader area, it is the bargaining unit set out in the collective agreement which defines the scope of the union's bargaining rights. This point was discussed in *MacGregor Crane Service Limited*, [1979] OLRB Rep. Aug. 777. In that case, Local 793 of the International Union of Operating Engineers, one of the applicants in these proceedings, had been certified by the Board to represent employees in one Board area. Subsequently, the union and an employer association representing the employer entered into a collective agreement covering a much wider geographic area. When the geographic scope of the bargaining unit was subsequently put in issue, the Board concluded that the union's bargaining rights encompassed the broader area. In reaching this conclusion the Board made the following comments, at p. 780:

"16. The respondent relied heavily in argument on the 1971 Board certificate restricting bargaining rights to Board #29. In our view this mistakes the effect of a Board certificate: such a certificate enables a trade union to legally compel an employer (who, by virtue of the certificate is legally obligated) to engage in collective bargaining. The parties may not bargain to an impasse in respect to the scope of coverage of such agreement if such scope varies from the terms of the certificate without running the risk of contravening the good faith bargaining obligation. However, as is made clear in the *Gilbarco Canada Ltd.* case [1971] OLRB Rep. Mar. 155. "The parties are free to amend, alter, extend or abridge the bargaining rights contained in the certificate." With the conclusion of the first collective agreement, the right to compel future bargaining flows out of that agreement. Again, as is said in the *Gilbarco* case, *supra* "in effect, the collective agreement supplants the rights given by the Board's certificate and the Board's certificate is spent once the collective agreement is signed".

17. It is clear to us that following the signing of a collective agreement, the certificate is irrelevant in determining the scope of bargaining rights, and definition of those can only be sought in the collective agreement between the parties.”

11. As indicated above, the Act does provide certain safeguards to employees with respect to voluntary recognition agreements. One such safeguard is to be found in section 60 of the Act, which stipulates that within the first year of a voluntary recognition agreement any employee in the bargaining unit, or trade union representing such an employee, may ask the Board to declare that at the time the agreement was entered into the trade union was not entitled to represent employees in the unit. Such a declaration has the effect of voiding the recognition agreement. Section 60 has generally been applied in instances where a trade union that had been voluntarily recognized by an employer could not demonstrate that at the time of the recognition agreement over half of the employees in the unit were members of the union. The actual wording of section 60 provides as follows:

“60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.”

12. Another major protection for employees against an improper voluntary recognition agreement is to be found in section 48 of the Act which states as follows:

“48. An agreement between an employer or an employers’ organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union; or

(b) if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin."

13. The applicants contend that pursuant to section 48 of the Act, the agreement between CLAC and the respondent should be deemed not to be a collective agreement outside of the Counties of Essex and Kent because it was the result of "other support" to CLAC by the respondent. It is contended that this "other support" was the respondent's action in agreeing to extend the geographic scope of the bargaining unit. The applicants do not specifically rely on section 60. However, they contend that in determining what constitutes "other support" for the purposes of section 48, the Board should have regard to the provisions of section 60 and conclude that the scope of the bargaining unit could only have been properly extended if at the relevant time CLAC had majority support among the respondent's employees employed outside of the Counties of Essex and Kent.

14. There is no specific evidence before us as to whether, when the scope of the bargaining unit was expanded in 1967, the respondent had any employees working outside of the Counties of Essex and Kent. However, having regard to the evidence we do have concerning the general nature of the respondent's operations at about that time, it is most likely that the respondent in fact had no employees working outside of Essex and Kent Counties. If, by chance, the respondent did happen to be performing a job outside of these two counties, in accordance with its general practice, it likely would have utilized CLAC members from its home base to do the work and, accordingly, CLAC would have had as members over half of the employees in both the enlarged bargaining unit as well as in the "added on" part of the unit. As already noted, however, it is most likely that at the time the scope of the bargaining unit was extended the respondent had no employees working outside of the Counties of Essex and Kent. Accordingly, we propose to deal with the matter on that basis.

15. In *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250 the Board in a non-construction matter considered the propriety of a bargaining unit being extended by voluntary recognition at a time when there were no employees in the geographic area added to the unit. It was the Board's conclusion that such an extension would generally be proper and should not be interfered with by the Board. In reaching this conclusion the Board took into account the benefits of a broadly based bargaining structure as well as the fact that in the "added-on" part of the unit there would be no current employees who might be adversely affected by the extension of the unit. The rationale for permitting the extension of a bargaining unit to cover areas where there are not now any employees is particularly compelling in the construction industry. It is not at all unusual for construction industry employers to perform work away from their regular base of operations and to either have their regular employees travel to the job site, or arrange to have the unions which they already deal with supply them with local union members. In either circumstance, it is to the benefit of employees, the trade union involved, and the employer, that the relevant terms and conditions of employment be set before any work actually gets under way. As noted above, it has been fairly common in the construction industry for the scope of bargaining units to be extended by voluntary recognition. It is also of some interest that in the *Nicholls-Radtke and Associates Limited* case [1982] OLRB Rep. July 1028, the Board upheld a voluntary "pre-hire" recognition agreement in the construction industry even though at the time it was entered into there were

absolutely no employees in the bargaining unit. In reaching this conclusion the Board decided that the entering into of the agreement by the employer did not constitute “other support” by the employer to the trade union such as to call section 48 into play. Given these considerations, we are satisfied that the expansion of the geographic scope of the bargaining unit in the instant case beyond the Counties of Essex and Kent did not involve the giving of “other support” by the respondent to CLAC such as to call into play the provisions of section 48 of the Act.

16. In his submissions, counsel for the applicants raised a particular concern with the fact that the extension of the bargaining unit represented by CLAC involved among other trades, carpenters and equipment operators. Counsel raised a concern about a possible situation where CLAC might be certified to represent certain trades and then by way of a voluntary recognition agreement expand the unit to encompass a number of other trades. While the Board may be required to deal with this type of situation in a future case, it is not a factor in these proceedings. CLAC was certified by this Board as the bargaining agent for a unit of “all employees” of the respondent, a unit which encompassed within its scope both carpenters and equipment operators. Accordingly, the extension of the bargaining unit involved a geographic extension only, and as we have already indicated, there was nothing improper about the extension.

17. Having regard to all of the foregoing, we are satisfied that CLAC currently represents an “all employee” bargaining unit of the respondent’s employees across the Province of Ontario. In these circumstances, and given both the provisions of section 144(1) of the Act, as well as the Board’s general policy in displacement situations of retaining the existing geographic scope of the bargaining unit, we are satisfied that the appropriate bargaining unit with respect to both applications before us is a unit which encompasses the entire Province of Ontario, including the Counties of Essex and Kent.

18. The parties disagree as to whether or not the two applicants should be permitted to “carve out” units of craft employees from the current “all employee” bargaining unit represented by CLAC. It is CLAC’s contention that due to the long relationship between itself and the respondent, the Board should decline to break up the existing unit. Counsel notes in this regard that section 6(3) of the Act gives the Board a discretion not to describe a unit in craft terms where the craft employees are already included within a larger bargaining unit. The mandatory craft provisions of section 6(3) of the Act do not, in fact, apply in circumstances such as these. Nevertheless, given the fact that union organization in the construction industry has traditionally been on a craft basis, the Board has a long-standing practice of allowing craft unions to carve out from larger bargaining units, units of employees who pertain to their particular craft. (See *Kent Tile* 61 CLLC ¶16,204). A particularly compelling reason for following this general practice in the instant case is to the fact that the provincial bargaining provisions of the Act prohibit unions such as the applicants from entering into collective agreements in the ICI sector which cover employees outside the scope of their provincial bargaining designations. (See *Manacon Construction Limited*, [1983] OLRB Rep. March 407). Given these considerations, we are satisfied that the Carpenters Union should be permitted to “carve out” from the existing bargaining unit represented by CLAC a unit of carpenters and carpenters’ apprentices and that the Operating Engineers Union should be permitted to “carve out” a unit of equipment operators.

19. At the hearing, counsel for CLAC contended that the Carpenters Union is not entitled to its requested bargaining unit because the employees it seeks to represent are welders and not carpenters. In reply, counsel for the Carpenters Union contended that the individuals in

question would fall within a bargaining unit described in terms of carpenters and carpenters' apprentices. As noted above, we are satisfied that the Carpenters Union is entitled to "carve out" from the existing bargaining unit a unit of carpenters and carpenters' apprentices. Whether the employees in question would actually come within such a bargaining unit, however, is a separate matter. Further, it is a matter which cannot be determined simply on the representations of counsel, but must await the leading of evidence on point.

20. The Registrar is directed to re-list these two applications for continuation of hearing. The purpose of the hearing is to hear the evidence and the representations of the parties with respect to all outstanding matters arising out of and incidental to the applications.

0121-84-OH Gerald P. Blaine, Complainant, v. Bill's Country Meats Ltd., and Rienes Steenhuis, Respondents

Health and Safety — Complainant believing person not strong enough to hold saw steady — Refusing to hold carcass for splitting as long as saw operated by person in question — Whether circumstances of refusal protected — Whether safety concern sufficiently communicated — Whether belief reasonable

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members J. A. Ronson and E. G. Theobald.

APPEARANCES: *Mark Grossman, Calvin Nixon and Gerry Blaine for the complainant; Cameron D. Trotter, Bill (Rienes) Steenhuis, Tom Vollmer, Sam Song and Steve Lantz for the respondents.*

DECISION OF THE BOARD; October 31, 1984

1. This is an application made pursuant to section 24 of the *Occupational Health and Safety Act* which alleges that the complainant was dismissed from his employ with the respondent, Bill's Country Meats Ltd., because of his refusal to do particular work where he had reason to believe that the operation of a circular saw in the splitting of hogs was a danger to his safety.

2. The respondent, Bill's Country Meats Ltd., (hereinafter referred to as "Country Meats") is a meat processing plant and abattoir in the Township of Merryborough. The operation includes the killing of live animals, together with scalding, scraping, gutting, splitting, cooling and cutting up of the carcasses. Country Meats is owned and operated by the respondent, Rienes Steenhuis. Gerald Blaine was employed at Country Meats between May of 1983 until November 25, 1983. Mr. Blaine was advised by Mr. Steenhuis it was not "an operation of specifics" and while Mr. Blaine felt he was hired as a meat cutter, it appears he could and did perform a number of the functions at Country Meats. Country Meats' kill floor is the hub of its operation and is where the contentious events of November 25, 1983 took place. The kill floor is a room of approximately thirty by forty-five feet and within it there were areas for knocking out and killing the animals, the scalding process, and the gutting, cutting and cleaning

processes. November 25, 1983 was a “kill day”. During a kill day, a live animal is introduced to the knockout box, killed and is then placed in a scalding tank. After scalding, it is moved to a table where its hide is scraped and then hung by its hind feet on hooks attached to an overhead rack which moves by rail to the elevated grating. At this point the animal is gutted by slitting open the belly from the underside of the tail area through to the neck, which is close to the floor. The carcass is then split by a saw. The splitting entails moving a saw down from the tail to the neck through the backbone of the animal. Once this is accomplished, the split carcass is then moved by rail to the cooler to await further cutting or shipment.

3. The events complained of revolve around the use of a newly installed saw which was used for the splitting of hogs. The saw was a circular saw which had been purchased by Mr. Steenhuis to replace a piston saw (reciprocal) which formerly had been used in the operations. The circular saw was not new but had been purchased from a used saw dealer. The circular saw was C.S.A. approved, presumably at the time it was manufactured, and is of the type normally used in the meat processing industry for splitting hogs. It had been installed the previous evening by the complainant and an electrician. The complainant hooked it up, putting a counterbalance in place. The counterbalance must equal the weight of the saw so that when the saw is released by the operator it does not drop to the floor. The new saw was acquired so that more carcasses could be split on a kill day than could be done with the piston saw. It is undisputed that the cutting time for one hog was reduced from 1 minute to 3-5 seconds. The piston saw consisted of a motor with a protruding blade which moved back and forth like a chain saw. In the splitting process this saw emerged somewhat through the back of the carcass. It was necessary for the carcass to be held steady by another person to ensure a straight cut.

4. The new circular saw is approximately 90 lbs. and it has a rotary action. Its blade also protrudes out the back of the carcass, but further than the old saw. The usual method of holding a carcass when using the piston saw was for the holder to grasp the hind leg and front leg of the animal on the same side. This placed the holder to the side of the saw blade approximately one foot away. We heard evidence that in other establishments where a circular saw is used, the splitting process is essentially a one — person operation. There is no necessity for another person, as in the case of a piston saw, because there is a metal bar which does the job. Indeed, at Country Meats after the November 25th incident, this usual-holding apparatus was obtained and used thereafter. Mr. Steenhuis termed this installation as having “corrected” the situation. On November 25th, the first day of the new saw’s use, it was clearly necessary for 2 persons to participate in the splitting process, one holding the hog while the other did the splitting. It is clear from both the evidence of Mr. Blaine and his foreman, Tom Vollmer, that when the piston saw was used, Mr. Vollmer did most of the cutting. When the old saw was used, Mr. Blaine often held the carcass. On November 25th, Mr. Vollmer did the first few cuts then handed the saw over to Sam Song, a fellow employee of Mr. Blaine. There was no formal introduction by anyone in management as to the proper use of the saw or what was expected by way of holding the pig.

5. Mr. Blaine claims he refused to hold the hog if Mr. Song operated the saw. There is contradictory evidence as to Sam Song’s capabilities with this new saw and it is those very capabilities which Mr. Blaine claims caused him to refuse Mr. Vollmer’s request on two occasions that he hold the carcass while Mr. Song cut it. According to the evidence of Mr. Blaine and Calvin Nixon, a provincial meat inspector who is required to be present on a kill day, Mr. Song had difficulty in controlling the saw and both he and Mr. Blaine felt that it jerked around too much. Mr. Vollmer and Mr. Steenhuis, as well as Mr. Song himself, maintained that at all times Mr. Song was an expert and competent operator of the new saw

and was in full control of it. Mr. Vollmer first asked Mr. Blaine to hold the carcass while Mr. Song operated the saw at approximately 11:00 a.m., four hours after the commencement of operations and the beginning of the use of the saw. Mr. Blaine testified that he told Mr. Vollmer that he would not hold the hog if Mr. Song was operating the saw. He said he advised Mr. Vollmer that if Mr. Vollmer or someone else operated the saw, he would hold the carcass. Mr. Blaine testified that between this refusal and Mr. Vollmer's second request Mr. Nixon, Steve Lantz (a fellow employee who had also refused) and Mr. Blaine discussed how a circular saw could be made safer and the fact that splitting a hog with this saw is normally a one — man operation because a steel bar holds the pig. On the second occasion when Mr. Vollmer asked Mr. Blaine to hold the carcass, Mr. Blaine testified that he said no because he wanted to retain all of his fingers. Mr. Song testified that he also asked Mr. Blaine, who Mr. Song felt was doing an easier job than he, to hold the hog for him and that Mr. Blaine replied there was "no way" he would go "near that thing".

6. Mr. Vollmer testified that he asked Mr. Blaine to hold the pig and Mr. Blaine simply said "no". Mr. Vollmer said he got the same answer the second time he asked. He said he received no explanation from him as to why he refused until "later". The "later" time appears to be sometime at a break when Mr. Vollmer recalls Mr. Blaine indicating that if Mr. Vollmer ran the saw, he would hold the pig. Mr. Vollmer said Mr. Blaine explained to him that Mr. Song was "too light". Mr. Vollmer was asked by his own counsel whether, on November 25th, he was concerned about the safety of the saw, and his answer was that "the thought went through my mind but I wasn't afraid". Mr. Vollmer testified he had asked Steve Lantz, after Mr. Blaine, to hold the hog for Mr. Song but Mr. Lantz also refused telling him that Mr. Blaine and he had decided it was too dangerous a job. After Mr. Blaine refused Mr. Vollmer's second request that he hold the hog for Mr. Song, Mr. Vollmer told him that if he did not want to do the work he could go home. Mr. Blaine then asked Mr. Vollmer if he should go home immediately or stay the day. Mr. Vollmer gave him the option of choosing. Mr. Blaine chose to stay the day. Two other employees of Country Meats who were asked by Mr. Vollmer that day to hold the hog steady agreed. Mr. Lantz, the other refuser, was not given the option of leaving or staying the rest of the day when he refused because Mr. Vollmer testified that he considered him more necessary to the operation than Mr. Blaine.

7. Within half an hour of this happening, Mr. Blaine encountered Mr. Steenhuis in the coffee room and, presuming that Mr. Steenhuis knew of the refusal he had made to do the work that Mr. Vollmer had assigned, simply informed Mr. Steenhuis he had been fired by Mr. Vollmer and he asked whether he should go immediately or stay the day. Mr. Steenhuis replied that he should stay the day. At the end of the day, Mr. Blaine again met Mr. Steenhuis who, at that time, asked him to be sure to leave his address so that the separation certificate and cheque could be forwarded to him. Mr. Blaine indicated that he was going to be coming up to pick up his cheque the following Friday. Mr. Blaine indicated to the Board that the reason he wanted to pick up his cheque was to give Mr. Steenhuis a chance to change his mind. However, when he picked up his cheque, he did not plead his case as to the safety of the saw. He said nothing to Mr. Steenhuis except to ask why his separation certificate indicated he had "quit". The only other work Mr. Blaine refused to do while at Country Meats was haying in connection with Mr. Steenhuis' own farm adjoining Country Meats premises. Eventually, he did do the haying work. Nevertheless, Mr. Vollmer held the opinion that Mr. Blaine was a person "who worked when he wanted to", possibly because Mr. Blaine did not work Mondays on a regular basis. Neither Mr. Steenhuis nor Mr. Vollmer ever disciplined or warned him that this was unacceptable, and from Mr. Blaine's description, it may even have been satisfactory to them. We heard evidence from both Mr. Blaine and Mr. Vollmer peripheral to these events

about Mr. Blaine being someone who did not see his job at Country Meats as a long-lasting one because of his desire to return to outdoor work which he had previously done and evidence about his distaste for working under Mr. Vollmer's supervision. While Mr. Blaine denied that there had been any actual arguments between Mr. Vollmer and him, he testified that he told Mr. Steenhuis that he was looking for another job because he did not want to "fight with Tom". Mr. Nixon commented in his evidence that Mr. Vollmer was the type of manager who wanted his orders followed with no questions asked. Undoubtedly, Mr. Blaine, who was 34 years old, found this attitude irritating in Mr. Vollmer, a 22-year old. Mr. Blaine also denied that he did not get along with Sam Song or that he called him racially disparaging names. He testified that Mr. Song was a very capable man except the circular saw "weighed more than he did".

8. It was Mr. Blaine's opinion that the counterbalance was heavier than the saw and Mr. Song could not safely manage the saw, especially to make it go downward. Mr. Blaine explained that the counterweight was not right because Mr. Steenhuis had instructed him to have it cut according to certain specifications which were not correct. Mr. Blaine claimed that the new saw required the individual holding the hog to take a position behind the backbone of the animal and wrap his arms around the carcass to hold open the split in the front of the cavity of the carcass. He was asked whether he observed others actually holding the carcass on November 25th, but he was uncertain whether he had. He said the holding technique that day varied with the individual and he could not specifically recall how Mr. Vollmer himself held the pig, if at all, on November 25th. Mr. Blaine candidly indicated he was not interested in how others did it. According to his conception of how he would hold the hog, he was placing himself in danger in view of Mr. Song's lack of ability to control the movements of the saw. Mr. Vollmer testified that the method for holding the hog is the same as that for the old saw. Mr. Nixon testified that the persons he observed holding the hogs on November 25th were trying every way they could.

9. Mr. Song testified that he had never before seen a saw like the new one. No one showed him how to use it, except Mr. Nixon, who intervened in the cutting process to try to demonstrate for Mr. Song more effective ways to handle the saw. Mr. Nixon testified that, prior to Mr. Blaine being requested to hold the hog, he had told Mr. Steenhuis about his concerns regarding the saw's safe operation. Mr. Steenhuis recalls Mr. Nixon talking about the saw but denies Mr. Nixon told him he thought it unsafe. We prefer Mr. Nixon's recollection to Mr. Steenhuis' because Mr. Steenhuis' evidence was tinged with more self-interest than Mr. Nixon's. Mr. Nixon struck us as an objective, conscientious bystander in this situation. It is clear from the evidence that, at least between Mr. Blaine, Mr. Lantz and Mr. Nixon, the safety of the holder of the carcass, while the new saw was being operated by Mr. Song, was the subject matter of some conversation prior to Mr. Blaine being asked to hold the hog by Mr. Vollmer. All three appeared to have formed the impression fairly early in the day that it was unsafe to hold the hog for Mr. Song.

10. Sections 23(3), (4) and 24(1) are relevant to these proceedings. They provide:

23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

- (a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;

- (b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or
 - (c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.
- (4) Upon refusing to work or do particular work, the worker shall promptly report the circumstances of his refusal to his employer or supervisor who shall forthwith investigate the report in the presence of the worker and, if there is such, in the presence of one of,
- (a) a committee member who represents workers, if any;
 - (b) a health and safety representative, if any;
 - (c) a worker who because of his knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade union, is selected by the workers to represent them,
- who shall be made available and who shall attend without delay.

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24.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.

A threshold legal issue raised in argument by the respondent was whether the facts, as described above, were covered by section 23(3) at all. The respondent claimed that since Mr. Blaine was not asked to “use” or to “operate” any “equipment, machine, device or thing” and since there was nothing unsafe about the “physical condition” of his workplace, Mr. Blaine’s situation was not protected. We cannot agree. Firstly, the words in subsection (a) are broad enough to encompass a two-man operation involving a piece of equipment, in this case the circular saw. It was clearly necessary for the saw’s effective use or operation in the circumstances that the hog be held. We find that Mr. Blaine was therefore involved in its use or operation, even though his hands were not actually on the saw. Secondly, even if we are wrong in the first conclusion, we also think that Mr. Blaine’s situation is encompassed within subsection (b) in that the

allegedly dangerous physical condition of his workplace was the inappropriately counterweighted saw being operated by an individual who could not control it. We have given these subsections a broad and liberal interpretation in keeping with the spirit of the *Occupational Health and Safety Act* which the Legislature enacted to protect employees who have reason to believe their work or workplaces place them in danger and, on this basis, refuse to do the work assigned. This interpretive approach is also in keeping with the *Interpretation Act* and the well-known canon of interpretation that remedial legislation ought not to be narrowly construed. There can be no question that the *Occupational Health and Safety Act* is a remedial piece of legislation. The respondent's argument that the Act is penal in nature may be true in other proceedings pursuant to section 37, but the proceedings before us do not lead to a penalty but, rather, compensation and other orders analogous to civil remedies (see section 24(1)).

11. This is a fact situation in which neither party to the events knew of the provisions of the *Occupational Health and Safety Act* at the time of the incident. The threshold factual question is whether Mr. Blaine successfully communicated that the reason for his refusal to hold the hog, while Mr. Song operated the circular saw, was because he had a reasonable apprehension for his safety. The essential core of the seemingly formal process laid down in the Act is that the employee who refuses to work must explain to his employer that he believes what he has been asked to do will endanger himself or others. The *Occupational Health and Safety Act* ought to be applicable or be made applicable to "real life" situations, even where the details of the provisions of sections 23(3) and 23(4) are not known to the employees and the employer. The provision requiring the refusing employee "to report" to his employer or supervisor really is a provision requiring that employees candidly explain why they are refusing to work, so that the employer can make an assessment of the situation and either rectify a dangerous condition or maintain that there is no danger. In *International Harvester*, [1983] OLRB Rep. June 898, the Board had this to say about section 23.

23. Section 23 sets out a code of conduct for employees and employers where employees have reasonable concerns about hazards to their health and safety in their work places and their employers disagree. *First of all, employees can refuse to work but must report the circumstances of that refusal to their supervisors.* Section 23 provides for a two-tiered investigation — initially by the employer immediately upon receiving the employee's report, and subsequently by Ministry of Labour inspectors after a continuation of the refusal. While the first tier occurs, the refusing employee must remain at a safe place near his work station (subsection 5) except, presumably, when his presence during the investigation requires something else (subsection 4). The employer, during this time, is given no right to assign alternate work, presumably because this would interfere with the employee's presence at the investigation and because the time taken up with the investigation is totally within the control of the employer. If, after this investigation, the employee continues to refuse to work because he has reason to believe his work or work place puts his safety in jeopardy and the employer continues to disagree with the employee's belief, then the inspectors from the Ministry must be called in. Pending this second-tier investigation, the employer can either assign "reasonable alternative work" or, where none is practicable, "other directions" which do not violate section 24.

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25. Between the initial work refusal and the decision of the inspector, the refusing employee and the employer are essentially locked in a contest of persuasion. Each must assess the situation and make difficult judgement calls. If at any time the employer correctly assesses the employee's beliefs as unreasonable, the full range of disciplinary action is available and this Board will not have any jurisdiction to interfere. Since employees only have the protection of the Act in circumstances where they can show their beliefs were reasonable, the Act provides for the employee's participation in both tiers of investigations.

(emphasis added)

In order for a work refusal to be protected by the provisions of the *Occupational Health and Safety Act* it must be shown that the employee has clearly stated safety to be the cause for the refusal. Unless the employee does this, the employer can interpret the refusal as simply a desire to avoid work or to cause a disruption in the work place. It is clear that on November 25th the safety of the operation of the circular saw was an issue that was under active discussion in a preliminary way between Mr. Nixon, Mr. Blaine and Mr. Lantz and between Mr. Nixon and Mr. Steenhuis. The request by Mr. Vollmer that Mr. Blaine hold the hog for Mr. Song occurred after there had been considerable experimentation, discussion and use of the saw by a number of individuals to try it out and after opinions had been formed as to its soundness. In these circumstances we hardly think it is likely that Mr. Blaine would simply refuse without any explanation on two separate occasions within a relatively short space of time, a request that he become involved with this saw. We can find no reason to disbelieve Mr. Nixon's recall of and notes of the day's events. It is an objective reporting by one experienced in this industry about what he heard and saw. While the portion of Mr. Nixon's notes in which he records Mr. Vollmer's request and Mr. Blaine's refusal were written 6 hours after the incident and with an eye to future litigation, they ring true as words spoken in this context between two men who had little use for each other. This is definitely "shop talk" and nothing in Mr. Blaine's evidence about the exchange between them in substance contradicts. Mr. Blaine merely omitted the raw language he and Mr. Vollmer used. Considering the background of Mr. Blaine's and Mr. Vollmer's relationship with each other, we also consider it unlikely that Mr. Blaine, who appeared to be a talkative, opinionated person, would miss the opportunity to tell Mr. Vollmer immediately his opinion of the saw and its operation by Mr. Song. Even if Mr. Blaine was as cryptic as Mr. Vollmer claims, Mr. Vollmer said himself that he knew, through Mr. Lantz, that both he and Mr. Lantz considered holding the hog dangerous. We have no doubt that Mr. Vollmer was told that the basis of Mr. Blaine's and Mr. Lantz's refusal was a perceived danger to their safety. It does not matter whether Mr. Steenhuis knew from Mr. Vollmer that there had been a work refusal by Mr. Blaine which was related to the safe operation of the saw, because Mr. Vollmer's knowledge in this instance is Country Meats' knowledge, and there is no doubt that Mr. Vollmer was Mr. Blaine's supervisor within the meaning of section 23(4) of the Act. Both Mr. Vollmer and Mr. Steenhuis seem to have misinterpreted Mr. Blaine's refusal as being simply a challenge to their authority which would give him an excuse to fulfill his expressed intention of leaving and as being in keeping with their perception of Mr. Blaine as one "who worked when he wanted to". While Mr. Blaine could have been a bit more expansive with Mr. Vollmer and Mr. Steenhuis about his specific concerns with the saw, nevertheless we find that he has fulfilled the first pre-condition of establishing his entitlement under section 23 of the *Occupational Health and Safety Act*, i.e., showing that he communicated to his supervisor a belief that he was or would be endangered by performing the particular work assigned.

12. The second matter we must decide is whether Mr. Blaine's belief was reasonable in the circumstances. We have come to the conclusion that Mr. Blaine, as the installer of the saw, formed the opinion that the counterbalance on the saw was not appropriate. Opposite opinions were heard from Mr. Vollmer and Mr. Song. Mr. Blaine believed that Mr. Song could not, without a proper counterbalance, properly manage the saw. His observations of Mr. Song bore this out. He heard an independent person, Calvin Nixon, express an opinion to the same effect. We found that a person in those circumstances would have reasonably come to the conclusion that he could be in danger if he held the hog for Mr. Song. The circular saw was much higher in speed and the potential for sudden serious injury greater. Mr. Vollmer himself acknowledged in his evidence that the new saw was more dangerous and caused him to give at least one thought to whether it was safe. While we were puzzled by Mr. Blaine's description of how he thought he would have had to hold the hog, inasmuch as he did not seem to have paid much attention to how others held the hog on that day, and his methodology was different from what had been done with the piston saw, nevertheless, we do not think that Mr. Blaine created an unreasonable method which, in and of itself, made the task dangerous. It appeared that during the morning when the saw was first operational a lot of experimentation and different approaches to the operation were tried, and it did not seem clear to us that there was any one method that was necessarily obvious, either from the cutting standpoint or the holding standpoint. This was confirmed by Mr. Nixon's evidence as well. We note that at the beginning of the day no formal instructions were really given by anyone in management to those who were going to be expected to either split or hold the hog as to what the correct methodology was; therefore, Mr. Blaine could have been under the honest misconception (if it was that) as to how he was required to hold it. We therefore have concluded that Mr. Blaine genuinely believed that he had to stand behind the backbone and hold the "gams" of the animal apart and thereby run the risk of losing some fingers at the entry point. Having believed the evidence of Mr. Blaine as to the inappropriateness of the counterweight and Mr. Nixon's honest opinion that the saw was not fully under Mr. Song's control, having seen Mr. Song's stature, as compared to Mr. Vollmer's, and having relied on the fact that Mr. Song had not been the one who had managed the old saw and that no instructions were given by management to either Mr. Song or potential "holders", we have come to the conclusion that Mr. Blaine's belief that he would be in danger if he held the hog while Mr. Song cut it with the circular saw was a reasonable one.

13. The final issue is whether Mr. Blaine was discharged by Mr. Vollmer and/or Mr. Steenhuis or whether Mr. Blaine had quit. We have no hesitation in concluding that Mr. Blaine was given only two choices, i.e., holding the hog or leaving the employ of Country Meats. While on one level it appears that he "chose to leave" Country Meats, his departure was made involuntarily. He could not choose to stay except to put himself in danger. While we believe that Mr. Blaine was actively seeking other employment elsewhere and had expressed his intention to leave as soon as he got such employment, the fact of the matter is that his departure was brought on earlier than perhaps he had intended or wished by his refusal of Mr. Vollmer's order to hold the hog while Mr. Song cut the carcass. The fact of the matter is that Mr. Blaine had not given a specific date for his leaving and, clearly, was doing this so that he could hang on to his job at Country Meats, which may not have been ideal in his terms but was still a job. For all these reasons we find that Mr. Blaine was discharged by the respondents, in whole or in part, because of his refusal to work pursuant to section 23 of the *Occupation Health and Safety Act*. This is a violation of section 24 and we so declare.

14. We are concerned about Mr. Blaine's own passivity in accepting his termination in these circumstances. He says that he wanted to pick up his cheque personally after November 25th because he "hoped Mr. Steenhuis would change his mind". Yet, on the day he picked

up the cheque and separation certificate, he did nothing to plead his own case or even raise the issue when he met Mr. Steenhuis. The only thing that seemed to concern him was what was written on the separation certificate, i.e., that he quit. We credit Mr. Blaine with enough knowledge of the unemployment insurance system to know that this reason for leaving Country Meats would postpone and reduce his benefits. This was his concern more than his hope that Mr. Steenhuis might change his mind. In view of Mr. Blaine's failure to try to make real a hoped-for change of mind by Mr. Steenhuis, we order that Mr. Blaine be compensated for lost wages between November 25, 1983 and the date he picked up his separation certificate. It was agreed between the parties that the Board would reserve on the matter of quantification of compensation. The Board, not this panel, will remain seized of the compensation issue should the parties have difficulty in reaching agreement on this aspect.

1358-84-R;1455-84-R Terry Schisler and Leonard Fox, Applicant, v. Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent, v. **Brink's Canada Limited**, Intervener

Practice and Procedure — Termination — Several local unions certified at different times for separate units — Collective agreement signed by employer and each local — Whether single bargaining unit or several separate units

BEFORE: Harry Freedman, Vice-Chairman, and Board Members F. C. Burnet and W. F. Rutherford.

APPEARANCES: *Terry Schisler on his own behalf and Victor Brown for Leonard Fox; Ken Petryshen and Gary Barr for the respondent; George Vassos, Jim Mulrooney and Arthur Morin for the intervener.*

DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN, AND BOARD MEMBER F.C. BURNET; November 9, 1984

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2. These are two applications for declarations terminating the bargaining rights which the respondent currently holds for employees of the intervener at its North Bay location. The application in Board File No. 1358-84-R relates to one full-time employee of the intervener and the application in Board File No. 1455-84-R relates to the part-time employees of the intervener. With the consent of the parties, the Board heard both applications at the same time.

3. All of the parties agreed that the respondent and intervener were bound by a collective agreement which commenced to operate on September 20, 1982 and expired on September 23, 1984 (See Exhibit #1). The applications were both filed during the last two months of that agreement by employees who were covered by the agreement. Therefore, the applications are timely.

4. At the opening of the hearing the respondent submitted that the collective agreement provides for one bargaining unit comprised of all of the employees of the intervener for whom the respondent and its sister locals hold bargaining rights. The applicants and intervener submitted, to the contrary, that there are several distinct bargaining units represented by the respondent and its sister locals, whether the document filed with the Board as Exhibit #1 is construed as a single collective agreement or several collective agreements. The parties were agreed that if the Board found that there was one bargaining unit described in the collective agreement, both applications would have to be dismissed. If there were separate bargaining units for the North Bay location of the intervener, the documentary evidence filed by the applicants in support of their applications would require the Board to determine whether the statements indicating that the intervener's employees no longer wished to be represented by the respondent which were filed were voluntary expressions of the employees who had signed them.

5. The parties to the agreement are Brink's Canada Ltd. styled as the "Employer" and the Teamsters Local Union No. 879, Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 91, Teamsters, Chauffeurs, Warehousemen and Helpers Local No. 141, Teamsters Union Local No. 938, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 880 styled as the "Union". The agreement in Article II sets out the recognition clause in the following terms:

Bargaining Unit:

(a) The UNION is hereby designated as the sole and exclusive bargaining agent for any and all employees who during the term of this Agreement work in any of the classifications listed in the Addenda attached hereto.

6. The signature page of the agreement provides as follows:

IN WITNESS WHEREOF each of the parties has caused this Agreement to be signed by their duly authorized officials or representatives as of this day of , in the year 1983.

TEAMSTERS LOCAL UNION
NO. 879

By "*W. R. Evans*" By "*Illegible Signature*"
Vice President-Labour
Relations

TEAMSTERS, CHAUFFEURS, TEAMSTERS UNION LOCAL
WAREHOUSEMEN AND NO. 938
HELPERS UNION LOCAL
NO. 91

By "*Robert Kelly*" By "*Howard Shelkie*"

TEAMSTERS, CHAUFFEURS, TEAMSTERS, CHAUFFEURS,
 WAREHOUSEMEN AND HELPERS WAREHOUSEMEN AND
 HELPERS
 UNION LOCAL NO. 141 OF AMERICA, LOCAL UNION
 NO. 880

By “*Illegible Signature*”

By “*Illegible Signature*”

7. The respondent called evidence about the negotiation and ratification procedures it followed in collective bargaining with the intervener. The respondent and its four sister locals each designate one or more delegates to sit on the Union’s bargaining committee which meets at one bargaining table with the intervener. The five local unions conduct a single ratification vote in which all employees covered by the agreement are entitled to vote. The result of the vote is tabulated based on the total ballots cast. Article XVIII of the collective agreement deals with the acceptance or rejection of any agreement in the following terms:

In the course of negotiations for a new master agreement and Addenda, the determination of acceptance or rejection of a proposed Master Agreement and Addenda shall be based on the total votes cast by eligible employees covered by the Master Agreement.

8. The respondent meets with the employees from North Bay, and from the two other locations of the intervener for which it holds bargaining rights, Sudbury and Sault Ste. Marie, to solicit their suggestions for bargaining proposals. The proposals from each location are then presented to the union bargaining committee, comprised of delegates from the five local unions, that determines which proposals will be presented to the intervener. The members of the committee attempt to reach a consensus about which proposals will be presented. If no consensus is reached, a vote is held by the committee about the proposals in dispute, with each local having *one* vote.

9. Each of the locations listed in the various addenda to the master agreement became subject to the agreement after one of the local unions that is a party to the agreement was certified to represent the employees at that location. In the case of North Bay, the Board issued two certificates to the respondent, for a full-time and part-time bargaining unit. Each addendum to the Agreement, running from Addendum “A” through to Addendum “O” with no Addendum “I”, contains a section 1 headed “Bargaining Unit” and listed in that section are the employee classifications subject to the agreement, as provided for in Article II (a). The parties agreed that seniority is exercised separately in each location covered by the agreement and that employees do not transfer seniority rights between locations.

10. Counsel for the respondent submits that there is one bargaining unit as evidenced by the recognition clause of the agreement, and by the bargaining structure. He further submits that the various addenda simply take into account local conditions, but they do not detract from the recognition clause which establishes one bargaining unit. Counsel relies on *Bestview Holdings Ltd.*, [1983] OLRB Rep. 185 to support his position.

11. The applicants simply submitted that they thought the bargaining units were the ones for which the union was certified.

12. Counsel for the intervener submitted that each addendum creates or establishes a separate bargaining unit, which is consistent with the way the bargaining rights for each of the units were obtained. He further submits that the bargaining rights for the employees are held separately by each of the local unions, and the 5 local unions are, at best, a council of unions, acting as the agent for each of the locals in respect of each of their bargaining units. He further submits that the way a union chooses to set up its own internal bargaining structure cannot dictate the description of the bargaining unit. He referred the Board to several sections of the Act to support his argument, and in particular section 41(1) which states:

Every collective agreement shall be deemed to provide that the trade union that is a party thereto is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein.

Since the five local unions are not a certified council of unions, he submits that they are not a single trade union within the meaning of the Act. Thus, he argues that the bargaining agent of the employees remains the local union which obtained bargaining rights in respect of each group of employees as defined in the addenda to the master agreement. The Board was referred to *M. J. Guthrie Construction Ltd.*, [1984] OLRB Rep. Jan. 50 at page 56 where the Board held that an uncertified council of trade union was not a trade union, but could enter into a collective agreement on behalf of the unions that were members of the council.

13. The collective agreement before the Board is between Brink's Canada Ltd. and five local unions of the Teamster's Union. Each of those locals is a discrete trade union which has acquired bargaining rights for different groups of employees of the employer at different times. There was nothing before the Board to suggest that the respondent's bargaining rights, obtained by certification, had been assigned or transferred to any other entity. In our view, the respondent continues to be the union that holds the bargaining rights for the two groups of employees in respect of which it was originally certified.

14. The collective agreement is signed by a different representative from each of the five local unions. The groups of employees covered by the agreement are contained in section 1 of each of the addenda entitled "Bargaining Unit". While the bargaining format and the method of ratification suggest one bargaining unit, in our view, the other factors adverted to suggest that there are separate bargaining units contained in that collective agreement. (See *Ontario Hydro*, [1978] OLRB Rep. Aug. 754.)

15. The *Bestview* case, *supra*, referred to by counsel for the respondent, although somewhat similar, involved an agreement between the employer and a single union. In this case, there are five separate unions, each of which obtained and holds bargaining rights for distinct groups of employees. In our view, that distinction is important to ascertain whether there is one or more than one bargaining unit.

16. In *Hickeson-Langs Supply Company Ltd.*, [1978] OLRB Rep. Nov. 996, two locals of the Teamsters Union had been certified to represent two groups of employees of the employer at London and Toronto at different times. The bargaining practice and collective agreement were described by the Board in paragraph 5 of that decision in this way:

The company and the two local unions have conducted common negotiations which resulted in a collective agreement in 1971, 1974 and 1976, signed by representatives of the company and by representatives of each of the

locals. The headings of the 1974 and 1976 agreements indicate that the parties thereto are the company on the one hand and Local 419 and Local 141 “collectively called the Union” on the other hand.

The Board reviewed the submissions of counsel in that case in this way:

11. The position taken by the Locals, however, is that the employees at London and the employees at Toronto form one bargaining unit. . . .

12. In support of its argument that there is only one composite bargaining unit, the union refers to the recognition clause in the collective agreement of March 29, 1976 which is incorporated into the agreement of June 19, 1978 set out above. The recognition clause states as follows:

The Company recognizes the Union as the exclusive Bargaining Agency with respect to all matters arising under this Agreement from all employees at Toronto and London, save and except foremen, persons above the rank of foreman, office staff, sales staff. Part-time and Casual employees and Students, shall be covered only as specifically set out in Appendix “B” to this Agreement.

17. The Board in that case noted the problem with the union’s position at paragraph 13 where it stated:

13. The argument based upon the recognition clause runs into initial difficulty in view of the fact that there are here two distinct bargaining agents, one in London and the other in Toronto.

18. The Board found in that case that there were two separate bargaining unit and commented as follows at paragraph 14:

In the instant case not only is there no question of one union being the overall bargaining agent but, on the contrary, there are two distinct certified bargaining agents — one in London and the other in Toronto. There is nothing to suggest that the locals comprised a council of trade unions under section 43 [now 51] of the Act, nor was there any suggestion that individual bargaining rights had been transferred from one local to the other or by both to a third bargaining agent of any kind. The Memorandum of Agreement recognizes the separate identities of the locals not only in the heading but, more to the point, in the text. The separate identities as bargaining agents are further emphasized by the manner in which the signatures are affixed to the document.

19. While some of the facts in that case are different from the facts before us, those differences are not material. The principles the Board applied there are, in our view, equally applicable here. The signatories to the agreement are the employer and each of the local unions. There is nothing before the Board to suggest that the bargaining rights the respondent obtained in respect of the employees at North Bay were assigned to any other entity. All of the addenda to the agreement refer to “bargaining unit” and seniority is exercised in each location separately.

It is for these reasons that we believe that the two North Bay addenda, addendum "N" and addendum "O" describe distinct bargaining units.

20. At the hearing of this matter, the Board reserved its decision on the bargaining unit issue raised by the respondent after receiving evidence and argument related to it. The Board then conducted its usual inquiry into the voluntariness of the statements filed in support of the two applications.

21. In respect of Board File No. 1350-84-R, the full-time unit, the Board received evidence from Terry Schisler, the only employee in the unit at the time it was filed and the only signatory to the statement filed in support of his application. The Board can entertain and process an application for a declaration terminating the bargaining rights of a union when there is only one employee in the bargaining unit. (See *A.R. Milne Electric*, [1982] OLRB Rep. June 911.)

22. Mr. Schisler's evidence was clear and straight forward. He had been opposed to the union before it began to organize in 1982, and has remained opposed to it after it was certified and up to the present time. There was no evidence of management involvement, actual or perceived, in respect of his application. In our view, his application has been made voluntarily, notwithstanding the unlawful conduct of the intervener more than two years earlier which had prompted the Board to certify the respondent under section 8. In our view, the Board can take cognizance of longstanding employee opposition to a union in assessing whether an employee's desire to seek termination of the union's bargaining rights is voluntary. (See *J.A.K. Electrical Contractors Ltd.*, [1977] OLRB Rep. May 275.)

23. We therefore find that not less than forty-five per cent of the employees of Brink's Canada Limited at North Bay in the full-time bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent union on September 5, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(3) of the said Act.

24. Victor Brown, an employee in the part-time bargaining unit at North Bay, appeared at the hearing on behalf of the applicant Leonard Fox in Board File No. 1455-84-R. Mr. Brown did not know who prepared the statement filed in support of Mr. Fox's application and was not present when anyone else signed it. The only evidence the Board has before it concerning that statement is that Mr. Brown signed it at the request of Mr. Fox. The Board has no other evidence as to the origination or circulation of the statement that the part-time employees no longer wish to be represented by the respondent.

25. The Board observes that Mr. Fox, by undated letter filed with the Board at the hearing, authorized Mr. Brown to speak on his behalf and on behalf of the other part-time employees. However, Mr. Brown had no direct knowledge concerning the circumstances under which the document signed by the employees indicating that they no longer wished to be represented by the respondent was prepared or how the other signatures to that document were obtained. Mr. Fox was specifically advised of the requirements that would have to be met to establish the voluntariness of the statement that was filed with the Board in support of the application seeking termination of the respondent's bargaining rights in a letter to him from the Board's Registrar

dated September 7, 1984, acknowledging receipt of his application. That letter provided, in part:

The applicant will be required to attend the hearing in order to present its case to the Board and to speak to such issues as may arise in connection with this application. Failure of the applicant to appear at the hearing of this case, either in person or through an authorized representative, will result in the rejection by the Board of the application.

It should be noted that any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signature [sic] was obtained.

[emphasis added]

Therefore, due to the absence of sufficient evidence concerning the origination and circulation of the statement filed in support of Mr. Fox's application, the applicant has failed to satisfy the Board that not less than forty-five per cent of the employees in the part-time bargaining unit have voluntarily signified in writing that they no longer wish to be represented by the respondent on September 17, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(3) of the said Act.

26. The application in Board File No. 1455-84-R is hereby dismissed.

27. With respect to the application in Board File No. 1358-84-R, having regard to our finding as set out in paragraph 23, the Board directs that a representation vote be taken of the full-time employees of Brink's Canada Limited. Those eligible to vote are all employees of the respondent at North Bay, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

28. Voters will be asked to indicate whether they wish to be represented by the respondent in their employment relations with Brink's Canada Limited.

29. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER, W. F. RUTHERFORD;

1. I dissent.

2. The last paragraph of clause 18 of the Brinks Master agreement states: "In the course of negotiations for a new Master agreement and addenda, the determination of acceptance or rejection of a proposed Master agreement and Addenda shall be based on the total votes

cast by eligible employees covered by the Master agreement.

3. This procedure means the adoptions or rejection of the Master agreement is governed by the overall vote of all units in the agreement. One unit may oppose the agreement but the over all vote of all units would be the determining factor.

4. It is usual in Master agreements to have addenda for the different areas to take into consideration local conditions that could include wages and seniority.

5. It was in evidence that each area submitted their contract amendments to a joint meeting where each local had one vote on the proposed amendments. The adoption or rejection of any proposal depended on the accepting by the majority of the group not the individual local, including the contract addendas for the different areas.

6. It is my contention that a company cannot through voluntary recognition and then negotiations for a master agreement with a union, deny that the agreement binds all parties when one unit applied to decertify the union.

7. I would have dismissed this application and on that basis would not have to decide on the voluntariness of the petition.

1548-84-R United Brotherhood of Carpenters' and Joiners of America, Local Union 1030, Applicant, v. **Elbertsen Industries Limited**, Respondent, v. Group of Employees, Objectors

Certification Where Act Contravened — Practice and Procedure — Unfair Labour Practice — Discharge of union organizer, threats of plant closure and support for employee committee during organizational drive flagrant violations of Act — Subsequent employer attempts to undo unlawful acts not making ascertainment of true employee wishes at work likely — Certificate issued without vote

BEFORE: Harry Freedman, Vice-Chairman, and Board Members W. H. Wightman and H. Kobryn.

APPEARANCES: *Frank Manoni and Thomas Dunn for the applicant; Lynn H. Harnden, G.P. Van Huffel and Charles Marquardt for the respondent; Ron Velej, Kevin Gurnsey, Denis Dupuis and Tim Garrison for the employees.*

DECISION OF HARRY FREEDMAN, VICE-CHAIRMAN, AND BOARD MEMBER H. KOBRYN; November 13, 1984

1. The applicant United Brotherhood of Carpenters and Joiners of America, Local 1030 seeks certification in respect of a group of employees of the respondent Elbertsen Industries Limited. The application, filed on September 14, 1984, stated that the applicant was relying

on section 8 of the Act, and set out the particulars upon which it relied to obtain certification under that section.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. At the hearing of this matter in Kingston, on October 10, 1984, the parties agreed to the following bargaining unit description, which the Board finds to be a unit of employees appropriate for collective bargaining:

all employees of the respondent in the Township of Kingston, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

4. The Board finds that there were 33 employees in the bargaining unit as of the application date. The union had filed evidence of membership, as defined by section 1(1)(l) of the Act on behalf of 12 of those 33 employees on or before the terminal date, which is the time as of which the Board determines the number of employees who are union members pursuant to clause 103(2)(j) of the Act. The documentary evidence of membership consisted of combination applications and receipts showing payment and receipt of \$1.00 with original signatures and counter-signatures. There was more than one collector. The evidence of membership was also authenticated by a Form 9 Declaration of Membership Evidence filed by the union. Two of the membership documents filed by the applicant were undated; however, the respondent and the representative of the employees agreed that the Board could treat those two documents as having been signed at about the same time as the other membership documents filed by the applicant. The membership evidence had been signed within 6 months of the union's application.

5. There were also filed with the Board on or before the terminal date 23 individually signed documents expressing support for the "Employees Association Committee of Elbertsen Industries." Ron Velej and others appeared at the Board hearing on behalf of the employees. While no evidence was led concerning the origination, execution or filing of those documents, the employees did lead evidence relating to the establishment and existence of the committee since such evidence was relevant to the union's application for certification under section 8 of the Act.

6. The Board received evidence from a number of witnesses called by the applicant, respondent and the employees. It appeared to the Board that all of the witnesses attempted to honestly recall the events about which they were being questioned. Although there were some minor inconsistencies in the evidence, the material facts relating to this proceeding were not in dispute, and the Board attributes any inconsistencies in the evidence to the individuals' perceptions at the time the conduct occurred about which they were giving evidence rather than to any attempt to mislead the Board, or colour their evidence for their own benefit.

7. Thomas Dunn was the union's principal witness and was the primary in-plant organizer for the applicant. He had begun working for the respondent in April 1984, and had been laid-off on the afternoon of Monday, August 20, 1984. The respondent, through the evidence of Charles Marquardt, its plant manager, conceded that Mr. Dunn's union activity had been a factor contributing to the decision to lay-off Mr. Dunn. Mr. Dunn was reinstated with full

compensation for loss of earnings on September 25, 1984, pursuant to the settlement of an unfair labour practice complaint that had been filed by the applicant in respect of Mr. Dunn's lay-off.

8. Mr. Marquardt first became aware of the union's organizing activity on Monday, August 20, 1984, and that afternoon laid-off Mr. Dunn. The next day, at 9:45 a.m., Mr. Marquardt convened a meeting of all of the production and mill employees. Mr. Dunn, who had been advised of the meeting by another employee, returned to the plant on the 21st, the first day of his lay-off, to attend the meeting. Mr. Marquardt, Ralph Fiegen, the sales manager and Wayne Guard, the production supervisor were also present, although Mr. Guard left shortly after the meeting commenced.

9. Mr. Marquardt opened the meeting by indicating that he knew that there was some talk of a union around the shop and that he wanted to know what was going on. Both Mr. Dunn and Mr. Marquardt testified that Mr. Marquardt solicited the complaints of the employees and suggested that a group of the employees could go to see "Gus", Mr. Gustaaf Van Huffel, the Vice-President of the respondent, about their concerns. While Mr. Dunn recalls that Mr. Marquardt suggested that a committee of employees be formed to negotiate with the company, Mr. Marquardt's recollection of the meeting was that he did not suggest an employee committee, but rather suggested only that a group of employees meet with the company.

10. Mr. Dunn and Mr. Marquardt both testified that Mr. Fiegen had stated that if the union were to come into the company, the company would close. Mr. Dunn's recollection was that Mr. Fiegen had indicated that he knew the owner quite well, the owner was getting on in years, and didn't need the problems that a union would bring so therefore he would close the company. Mr. Marquardt testified that Mr. Fiegen had said that the company's customers preferred not to do business with a union shop, and if the union came in it could result in a loss of business and could shut down the company.

11. It is not necessary for the Board to resolve the differences in the testimony of Mr. Dunn and Mr. Marquardt concerning the meeting of August 21, 1984. It is clear that a meeting of all production employees was convened by the respondent's management where management solicited the complaints of the employees knowing that a union organizing campaign was taking place, suggested, at the very least, that instead of the union, the employees organize themselves and select a group of employees to meet with company, and made it clear that if the union was successful in organizing the employees, the company would close.

12. Mr. Dunn also testified that most of the employees had been quite interested in the union until the company meeting of August 21, but that after the meeting, no employees would talk to Mr. Dunn about the union.

13. The Board heard evidence about the establishment and operation of the committee from several witnesses, including Timothy Garrison, Mr. Van Huffel, Mr. Marquardt, Kevin Gurnsey and Ron Velej. It is clear to the Board that the members of the committee viewed themselves as an alternative to the union. The Board has no doubt that the members of the committee were acting sincerely in what they thought were the best interests of the employees. However, on the evidence, it is clear that the concept of an employee committee arose only after the August 21, 1984 meeting at the implicit, if not direct, suggestion of the company and in light of the assertion that if the company was required to deal with the union, it would close down.

14. The committee, comprised of seven employees, met on company premises during working hours to prepare proposals and had formal meetings with the company on two occasions. At the first meeting between the company and the committee certain items that the committee requested were agreed to (see exhibit #3) and following the second meeting between the company and the committee a detailed letter signed by Mr. Van Huffel (exhibit #4) was distributed in the plant. That letter reads as follows:

September 4th, 1984

TO ALL PLANT PERSONNEL,

It appears that meetings between management and the plant employees' committee over the past few days have resulted in better mutual understanding.

Management has become more aware of your frustrations as related to working conditions, job security, and wages. You have become more aware of the company's difficult struggle to survive over the past four years.

The result is a mutual commitment to work towards the improvement of the company's position for the benefit of all of us who depend on its success.

A few measures with the object of improving morale have been agreed upon.

- 1.) Pay cheques, starting immediately, will be issued weekly.
- 2.) One week's notice will be given for temporary lay-offs.
- 3.) All hourly paid employees will receive a pay increase of 25 per hour starting with the first pay cheque in each of the following months: September and November 1984, and January and March 1985.

Other suggestions by the committee such as the application of more uniform wage rates have been agreed to in principle; *but the details remain to be worked out over the next few weeks as a co-operative effort.*

[emphasis added]

To determine the cost to the company of a pay increase of just one dollar per hour, please multiply an average of 50 employees by an average of 2000 hours worked per year. No chicken feed, right? There is only one way this company can afford the one dollar increase which has been agreed to over the next seven months: that is by improving productivity! There is also only one way the company can afford to extend any further benefits: that is by improving productivity even more!

Even if sales return to the high levels experienced earlier this year, unless productivity improves significantly, the one dollar per hour wage increase will without any doubt result in a loss for the year. Through co-operation,

however, vast improvement is possible. Although it is certainly very important, hard work alone will not do the trick. To substantially improve the company's financial position and the standard of living of its employees, we will need ideas, ideas that will reduce costly waste of time and materials when hammered out and implemented co-operatively.

Hoping that the enthusiasm for a new start evidently felt by some of us can be shared by all.

Sincerely,

That letter from the company made it clear that it was dealing with the plant employees committee as a way of bargaining with the employees. It is also clear from the underlined statement in that letter that the company wished to continue dealing with the committee in the future.

15. On September 25, 1984, in accordance with the Minutes of Settlement that were filed with the Board as exhibit #1, the company agreed to settle the unfair labour practice complaint which related only to the lay-off of Mr. Dunn, by reinstating him with full compensation. Between the time of Mr. Dunn's lay-off on August 20, 1984 and his reinstatement on September 25, 1984, there was no active organizing attempted by the union, although the Board did hear evidence that a meeting was called by the union for August 23. Approximately ten employees came to attend that meeting. Mr. Frank Manoni, a union official, failed to appear. A later union meeting was scheduled for August 29. Only approximately four employees arrived.

16. On the day before Mr. Dunn's reinstatement, the company, through Mr. Marquardt, delivered to every employee the following letter, which was filed as exhibit #2 in these proceedings:

September 24th, 1984

TO EMPLOYEES OF ELBERTSEN INDUSTRIES LIMITED

As you are aware the Carpenter's Union has applied to the Ontario Labour Relations Board to be certified as your Trade Union Representative.

I want to make sure that you aware of the facts around this application and the company's position regarding your being represented by a Union.

The Union is asking in its application to the Labour Board that it be certified without a vote by the employees. It claims that the Board should do that even if the Union doesn't have enough support among the employees. The Union says that this should happen because the company has acted improperly in the following ways.

The Union claims that the company laid off Tom Dunn in August because he was a Union organizer. It says that we threatened to close the plant if the Union got in. It also claims that the company was wrong in negotiating with the employees committee and agreeing to make wage increases and

other changes. I want you to know the company's position and what it intends to do about these claims:

- 1) We are contacting Tom Dunn today to tell him he can report to work tomorrow. If he does so, we will pay him his lost wages since his lay-off. I can assure you that *NO ONE* needs to be worried that they will be laid off because they support the Union. That is your right and we will not interfere with it in any way.
- 2) If the Union is certified the company will negotiate in good faith with its representative. We will not attempt to withdraw the wage increases which have been promised.
- 3) I promise you the company has no intention to closing the plant simply because the Union is certified. The success of this plant will depend on our ability to produce efficiently and to sell our product and nothing more.
- 4) Tomorrow at 4:00 p.m. I will shut down the plant and provide all employees a half hour to discuss whether they want a Union. No member of management will be present. If the Union wants to, they can send a representative to speak to you.
- 5) You should know that if you wish to sign a Union Card you must do so before Wednesday.

I would not be honest if I said that I wanted to deal with the Carpenter's Union rather than with each employee on an individual basis. But it is your right and decision to choose to bring in a Union or not and I do not want to interfere with that decision.

Very Sincerely Yours

"Gustaaf P. Van Huffel"
Vice-President.

Mr. Dunn was present at the meeting of employees envisaged by the company in item 4 of the letter. He testified in cross-examination that he tried to ascertain whether any employees were still interested in the union. They indicated to him that they were not interested. He also testified that some employees expressed concerns over the business slowing down and possibly closing if the union was certified.

17. In determining whether to certify a trade union under section 8 of the *Labour Relations Act*, the Board must be satisfied of three conditions:

1. The employer has contravened the Act;

2. The contravention makes it unlikely for the Board to ascertain the true wishes of the employees;
3. The union has membership support adequate for the purposes of collective bargaining.

18. It is beyond question that the respondent's initial responses to the union's organizing campaign were flagrant violations of the Act designed to stop any further lawful organizing activity from taking place among its employees. The lay-off of Mr. Dunn, who was the main in-plant organizer for the union, removed the union presence from the respondent's premises. In addition, the company convened a meeting the day after the lay-off where it threatened to close the plant if the union was successful. The company solicited employee complaints and suggested that employees organize to represent themselves rather than support an outside independent union. These were all clear attempts to stop employees from joining or supporting the applicant and to provide an alternative to a union through which employee concerns could be expressed to the company. The Board, therefore, finds that the respondent's actions on August 20 and 21, 1984 violated sections 64 and 66 of the Act. (See *The Globe and Mail*, [1982] OLRB Rep. Feb. 189; *Homeware Industries Ltd.*, [1981] OLRB Rep. Feb. 164.)

19. The continued recognition by the company of the employee committee as a bargaining representative of its employees and the purported negotiation of wages and working conditions with that committee continued the effect of its earlier violations. It was, in our view, further conduct which violated section 64 of the Act. By permitting the employees committee to meet on its premises during working hours, and indeed, by agreeing to their proposals, as late as September 4, 1984 when it knew that a union organizing campaign had been ongoing, the company further interfered with the selection of a trade union by the employees contrary to section 64 of the Act.

20. In *Upper Canadian Furniture Limited*, [1981] OLRB Rep. July 1016, the Board commented on the continued existence and recognition of an employee committee formed with the approval of an employer:

38.If there is a simultaneous union campaign then even if the employee association is not seeking certification an employer must exhibit considerable caution in his relationship with persons known to favour an employee association over the union. Section 56 [now 64] of the Act protects an employer's ability to freely express his views but only so long as he does not interfere with the selection of a union and so long as the expression of his opinion does not constitute coercion, intimidation, threats, promises or undue influence. For an employer to attempt to use his right to free speech to initiate an employee association to compete with a union is not protected by section 56. Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of section 56 of the Act. Given their economic dependence on their employer, employees may be readily swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.

See also *Primo Importing and Distributing*, [1983] OLRB Rep. June 959.

21. The Board is also satisfied that the union has membership support adequate for collective bargaining. Prior to any unlawful activity, the union was able to obtain more than thirty-six per cent membership support. Membership support adequate for collective bargaining under section 8 does not require a majority of employees to join the union. If the union can demonstrate that it has a significant core of support within the bargaining unit, it can at least commence to engage in meaningful collective bargaining. The Board cannot compel the employees to join or support the union during the bargaining for the first collective agreement. It can, however, under section 8, permit the union to begin to bargain and attempt to obtain further support among the employees in order to enhance its bargaining power with the employer. The degree of membership support that is adequate for collective bargaining can vary, depending on the individual circumstances of the case. (See *Dr. Hillers Peppermint Canada Ltd.*, [1979] OLRB Rep. May 375; *Skyline Hotels Limited* [1980] OLRB Rep. Dec. 1811). It is clear from the evidence of the employees that they desire some form of collective bargaining, albeit through an employee's committee rather than through the applicant union. In our view, that desire for collective bargaining provides an environment in which the number of members that the union does have in this case is adequate for collective bargaining.

22. As to the final element necessary for the Board to have the authority to issue a certificate under section 8, it is apparent that the unlawful conduct of the respondent prior to September 24, 1984 was such that the true wishes of the employees were not likely to be ascertained during that time. As the Board noted in *Di-Al Construction Limited*, [1983] OLRB Rep. March 356 at 360:

“A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. . . . In the face of this discharge I doubt that employees would now be able to freely decide for or against the union.”

Not only did the respondent lay-off the prime union supporter, it threatened the closure of the plant if the union was certified. The impact of this type of threat was dealt with by the Board in the *Globe and Mail* case, *supra*, where it stated at paragraph 60:

The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited*, *supra*, *Lorain Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Sommerville Belkin Industries Limited*, [1980] OLRB Rep. May 791 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419.)

23. Counsel for the respondent argued that section 8 was inappropriate in this case because of the remedial steps it took. He referred to the reinstatement of Mr. Dunn, the

undertaking not to close and the recognition of employee rights under the Act. He argued that these actions eliminated the effect of the company's previous unlawful activity.

24. The Board finds a good deal of merit in counsel's able submissions, but we are not persuaded on the evidence in this case that the respondent's attempt to undo the wrongs it had committed was enough to negate the impact of its threat to close, the lay-off of Mr. Dunn and its support for the employee committee as the preferred alternative to an independent union, on the decision making ability of the employees. Mr. Dunn's lay-off lasted for more than a month before he was reinstated and the letter of September 24 was delivered. During that month the respondent bargained with the employee committee, and the evidence of Mr. Dunn indicated that the threat of plant closure was still on some employees' minds, even after that letter was distributed. In our opinion, the respondent's action of September 24, 1984 was a reasonable attempt at rectifying its previous conduct. However, more than a month had elapsed before the respondent was prepared to openly recognize the legal rights of its employees under the *Labour Relations Act*. During that period the respondent's reaction to the union and its supporters had been made clear to the employees. In our view, the letter together with reinstatement and compensation for Mr. Dunn, and the opportunity for the employees to meet with union on company premises came too long after the unlawful conduct began and continued to have the curative effect argued for by the respondent's counsel. Furthermore, the employee committee was still in existence and there was no attempt by the respondent to address that element of its illegal conduct.

25. The Board has previously commented upon an employer's attempt to rectify the impact anti-union conduct. In *Westgate Nursing Home Inc.*, [1983] OLRB Rep. Jan. 159, the employer had improperly suspended a union steward for two days. The employer subsequently posted a notice to employees advising them of their rights under the Act and undertaking that he would not violate the Act again. Approximately two weeks later a petition in support of an application for a declaration terminating the union's bargaining rights was taken up among the employees. The Board in that case had to determine the effect of the two day suspension of the union steward and the subsequent posting by the employer of that notice on the voluntariness of the termination petition. The Board wrote at page 163 of that decision:

It is readily apparent from the uncontradicted evidence that Mr. Bond suspended Ms. Clark with the sole intention of "getting at" Mr. Burshaw, the person responsible for administering the collective agreement. In the Board's assessment Mr. Bond's retaliation against the union channelled through the suspension of the chief steward was not sufficiently nullified by the posting of the June 10th Notice to Employees to satisfy the Board that statement of desire circulated less than two weeks later was a voluntary expression of the views of its signatories.

We similarly find that, notwithstanding the respondent's actions on and after September 24, 1984, the true wishes of the employees in the bargaining unit are not likely to be ascertained.

26. The Board is satisfied that all three elements for certification under section 8 of the Act have been established. We hereby exercise our discretion under that section to certify the applicant union. Had the respondent not taken the steps that it had on September 24, the Board would have likely been persuaded to grant a broad range of remedies in addition to a certificate to the applicant. However, in our opinion, the respondent's recognition of employee and union rights, together with the undertaking it gave to bargain in good faith with the union if the union

was certified satisfies us that there is no need for any other remedial orders to be made in this case to support the certificate we are about to issue.

27. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER, W. H. WIGHTMAN;

1. I am gravely concerned as to how this decision will be interpreted and acted upon in the labour relations community.

2. This is a situation wherein a plant manager, and perhaps others of managerial status, acted inappropriately upon learning of an organizing campaign and in the absence of their superior — the vice-president (Gustaaf Van Huffel). The lay-off of Mr. Dunn on August 20 and statements made by Mr. Marquardt at the August 21 meeting were undoubtedly violations of the Act. These actions were also *fait accompli* by the time of Mr. Van Huffel's return to Kingston.

3. We do not know when or through whom Mr. Van Huffel became aware that the actions contravened the Act, but we do know that:

1. without any prompting from the Ministry, the Ontario Labour Relations Board or the Union, Van Huffel put into the hands of each and every employee on September 24 a letter (see paragraph 16 of the majority award) the text of which goes beyond anything I would have expected the Board to have required the employer to include in a posted Notice to Employees had the employer chosen to wait until he was "found out" rather than act of his own volition to remedy the harm to Dunn in full and to reassure the employees, in the most positive terms conceivable, as to their rights and their prospects for continued employment with or without union representation, and,
2. notwithstanding Mr. Dunn's assertion that after the August 21 meeting no employees would talk to him about the union, the applicant was unable to call any substantive evidence to suggest that it had attempted to renew its efforts to organize during the period from September 24, when each employee received the letter, until the date of hearing.

4. With respect to the latter point I do not think it is open to the union claim, or for us to infer, that the voluntary re-instatement of Dunn with full pay and issuance of the September 24 letter did not ameliorate the perceived "chilling effect" of the employer's earlier actions, when the union failed to renew its organizing efforts.

5. My greater concern, however, relates to the manner in which the labour relations community will view the "reward" that awaits an employer who, having made mistakes, attempts to correct them by anticipating the very action the Board could prescribe and taking that action voluntarily and wholesomely.

6. In citing *Westgate Nursing Home Inc.*, *supra*, at paragraph 25 of the majority, it should be noted that the posted notice referred to therein had come about as a consequence of the Board's settlement efforts, thus differentiating that case from the matter before us not

only at law but, more importantly, in terms of the realities of labour relations and industrial life.

7. Perhaps by inference, the majority of this panel are calling into question the efficacy of the notices directed by the Board in cases where such conduct is only admitted to or revealed in the course of a Board hearing. At the very least the decision will give employers cause to question the wisdom of deporting themselves in a manner I can only believe the Board wishes to foster and encourage rather than penalize. Sadder still is the fact that this is first instance of such praiseworthy conduct having come to the attention of the Board to my knowledge.

8. Finally I note the majority disapprove of the continued existence of the employee committee. As was noted in the dissenting opinion of *Primo Importing and Distributing Co. Ltd.*, *supra*, at page 972 the Board effectively “allows the applicant union a vested interest in the representation of the bargaining unit, even when the applicant is *not attempting to actively organize the plant*” (my emphasis). It should be noted that such attempts to resolve employer/employee differences and accommodate their respective interests becomes a breach of the Act only through time and circumstances and brands both the employer and employees as having acted unlawfully.

9. Notwithstanding some interpretations as to the purposes of the *Labour Relations Act*, I would have thought the fostering of courses of action such as that voluntarily undertaken by the respondent would be somewhere among them. In pursuit of that objective I would have found that the employer had successfully (and commendably) redressed the earlier violations of the Act. In this case the consequent “reward” to the employer and “penalty” to the union would have been a government-supervised secret ballot to determine whether or not they wished to be represented by the union.

1397-84-U The United Brotherhood of Carpenters and Joiners of America, General Workers Union, Local 1030, Complainant, v. **F. Leblond Cement Products Limited**, Respondent

Union Security — Collective agreement not excluding probationary employees from whole or part of agreement — Whether s.43 duty of check-off applying to probationary employees — Union's right to demand s.43 check-off during term of agreement confirmed

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and M. A. Ross.

APPEARANCES: *Frank Manoni and Alfonso Sartarelli for the complainant; Juri Kukk for the respondent.*

DECISION OF THE BOARD; November 26, 1984

1. This is a complaint under section 89 of the *Labour Relations Act*, alleging that the respondent employer has refused to respond to a request made under section 43(1) of the Act.

2. Section 43(1) provides:

Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, *whether or not the employee is a member of the union*, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

(emphasis added)

The parties are presently covered by a first agreement which expired on July 31, 1984, and which contains a provision which, on its face, appears to comply with the statutory mandate of section 43. It states in Article Four:

Membership

All employees covered by this agreement shall be members or become members of the Union and maintain such membership in good standing throughout the term of this agreement.

The Company shall deduct from the earnings of all employees initiation fees and monthly Union dues in an amount stipulated by the Union and remit such deductions to the Union by the 20th day of the month in which the deductions were made. Such remittance shall be accompanied by a list of the names of the employees for whom deductions were made.

(emphasis added)

The problem arises, however, from the fact that the respondent employer takes the position that this clause of the agreement does not apply to *probationary* employees. Article Six of the agreement provides in part:

Seniority

The Company agrees to recognize seniority for all the employees. Seniority shall be maintained and accumulated during: Absence due to lay-off, sickness or accident and authorized leave of absence. The seniority of a new employee shall take effect upon completion of a six (6) month probationary period.

The complainant recognizes that the question of which party's interpretation of the collective agreement is correct would properly be the subject matter of grievance arbitration. The complainant asks the Board, however, to deal in these proceedings with an alternative position that it relies upon and that is, that if the trade union's security clause does not mean what the complainant thought it did during negotiations, but rather what the respondent now says it does, the complainant requests rectification of the clause pursuant to the requirements of section 43 of the Act.

3. Section 43 of the Act applies to dues only, and the respondent's owner, Mr. Kukk, points to no language in that section suggesting that the legislated words "each employee in the unit" assume an exclusion for "probationary" employees. Rather, Mr. Kukk points out that the section only applies to employees in the unit "affected by the collective agreement", and argues that it was the clear intention of *both* parties at negotiations that the collective agreement would not apply to "probationary employees".

4. The problem for Mr. Kukk, who at all times has acted without counsel in dealing with the Union, is that no such exclusion is apparent from the face of the agreement itself. The "Recognition" clause provides, in accordance with the Board's certificate:

The Company recognizes the Union as the sole exclusive bargaining agent for the employees of the Company save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and truck drivers.

There is no exclusion for "probationary employees" from the agreement as a whole, and indeed, such a total exclusion would be unusual. What is *not* unusual is for parties to a collective agreement to negotiate certain limitations on the rights of probationary employees, as the parties have done here, for example, with respect to "seniority" rights. It is also not uncommon to find exclusions in one form or another for probationary employees with respect to the payment of union dues or initiation fees. That, in fact, was the case in the very collective agreements which Mr. Kukk was using for reference at the time of negotiations. The D. Kemp Edwards Limited collective agreement, for example, provided:

5.01 All present employees within the bargaining unit shall remain members of the Union and every new employee, *upon completion of the probationary period* of thirty (30) calendar days, shall join the Union as a condition of continued employment with the Company.

5.02 The Company agrees, during the term of this Agreement to deduct from the wages of each employee in the bargaining unit *who has completed the probationary period* as amount equal to the regularly authorized union dues and assessments. . . .

(emphasis added)

Similarly, the Central Precast agreement provides:

A check-off system for Union initiation fees and dues shall be instituted and made operative for the lifetime of this Agreement.

Deductions for initiation fees and dues shall commence *on completion of the thirty-day trial period* upon presentation by the Union of a standard check-off authorization.

(emphasis added)

The agreement which Mr. Kukk negotiated and signed contained no such qualification to indicate that probationary employees were considered to be excluded from the application of the agreement as a whole, or even of the provisions of Article Four itself.

5. Mr. Kukk argues that the requirement in Article Four that all employees either be or *become* members of the Union proves that employees do not in fact join the Union at the outset of their employment, but rather at the end of their probationary period only. The problem with this argument is that it assumes that the requirement to actually join the Union is synonymous with the deduction and remission of the equivalent of Union dues. As section 43 itself makes clear, the two are *not* synonymous. In fact, the Union more recently noticed the failure of Article Four in its first paragraph to specify a time limit for employees “becoming members”, and in its proposals for the renewal of the agreement asked for an additional sentence to call for initiation into the Union within 15 days of the commencement of employment. The Union did not ask for the same kind of stipulation with respect to the payment of dues because, as Mr. Manoni testified, the Union believed they already had that. On all of the evidence, the Board cannot conclude that the Union ever shared Mr. Kukk’s view that probationary employees were not covered by the collective agreement, or by Article Four. While the Union’s steward may well have been lax in following up the status of new employees, we do not find that it would have been obvious to Mr. Manoni, who negotiated the collective agreement for the Union, that additional employees other than students (who *are* excluded) were ever hired.

6. The Board decided in *Northwest Merchants Ltd.*, [1983] OLRB Rep. July 1138, that the parties were free to negotiate *less* by way of Union Security than section 43 provides (e.g., as one finds in the collective agreements quoted above), and that an employer is free to propose such accommodations so long as it does not press that proposal to impasse.

7. The Board in *Dryden Truck Stop Inc.*, [1983] OLRB Rep. Aug. 1300, also decided that, at least in a case like that one and the present, where it is not apparent that the Union has deliberately traded away in negotiations part of what it is entitled to demand under section 43, the Union may request its full entitlement at any time during the term of the collective agreement itself. The Board found that the request must clearly be based on the provisions of section 43 of the Act, and that, once having been so made, the liability of the employer runs

from that date. In the present case, we cannot find that a clear request under section 43 to “amend” the dues provisions of Article Four of the collective agreement so as to include probationary employees, if that is what the employer felt was required, was made by the Union prior to August 27, 1984, the date of filing this complaint.

8. The Board accordingly directs the respondent to treat the dues deduction provisions of Article Four of the collective agreement as including probationary employees, and to remit to the complainant regular Union dues, as defined by section 43(2), on behalf of such employees, for the period commencing September 5, 1984, the date of receipt by the respondent of this complaint.

9. The Board will remain seized in this matter should the parties be unable to agree on payment of the amount of “dues” currently owing.

2980-83-R;2981-83-U;3046-83-U United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant, v. Imperial Flavours Inc., Respondent, v. Group of Employees, Objectors; United Food and Commercial Workers International Union, AFL-CIO-CLC, Complainant, v. **Imperial Flavours Inc.**, Respondent

Certification Where Act Contravened — Discharge for Union Activity — Unfair Labour Practice — Employer’s prima facie defence of no knowledge of union activity not rebutted by union — Discharges not unlawful — No certification without vote

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members A. Grant and L. Collins.

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER A. GRANT; November 22, 1984

1. The application for certification in Board File No. 2980-83-R was made March 19th, 1984. A letter from the applicant dated March 30th, 1984 requested that the Board certify the union without a representation vote pursuant to section 8 of the *Labour Relations Act*. The application was listed for hearing on April 27th, 1984 but, on consent of the parties, no hearing was held. Instead the parties met with a Board Officer and resolved a number of issues, one of which was with respect to the appropriate bargaining unit. Having regard to that agreement, the Board finds that the unit described below constitutes a unit of the respondent’s employees appropriate for collective bargaining.

All employees of the respondent at Mississauga, Ontario, save and except supervisor, persons above the rank of supervisor, quality control and office staff.

2. The application subsequently was listed for hearing on May 1st, 1984, together with the complaints filed under section 89 of the Act. The Board heard a series of preliminary motions that the application for certification be dismissed without hearing. For reasons given orally

in the hearing and in an interim decision, the Board dismissed the motions. The Board heard the evidence and representations of the parties on the merits of the application/complaints at hearings on May 8th and July 10th.

3. The two complaints were filed under section 89 of the Act, in each case alleging that the respondent violated sections 64 and 66(a) when it terminated the employment of Chris Blais, Mason Hiles and Reynell Prempeh on March 16th, 1984 and Cliff Davis and Mark Partridge on March 20th, 1984. In the first instance the complaint was filed on March 19th (Board File No. 2981-83-U) and in the second one it was filed March 22nd (Board File No. 3046-83-U). The union is relying on those two complaints in support of its request made by letter dated March 30th that the Board certify it without a representation vote should it not otherwise be eligible under section 7(2) of the Act to be certified without a vote. The letter makes further allegations in support of that request. Those allegations are that the respondent held a meeting of employees on March 19th during working hours, on its premises, at which the respondent is alleged to have promised certain specific benefits to the employees and made statements threatening to the job security of the employees if the union gets in; the respondent posted alongside of the Board's notice to employees of the application a current newspaper clipping about a union campaign at an Eaton's store; and two days later issued a letter to all employees commenting on the application and enclosing a photo-copy of the aforementioned newspaper clipping.

4. Sections 8, 64 and 66(c) of the Act provide as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

5. The nature of the union's allegations with respect to the two complaints of unfair labour practices brings into play section 89(5) of the Act which requires the respondent to prove that it did not violate the Act when it terminated the employment of the five grievors. That burden of proof was described by the Board in the following oft-quoted passage from its decision in the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745, at paragraph 17:

... the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts. First, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.

Clearly, therefore, if the respondent is to satisfy that burden of proof, it must establish on the balance of probabilities that the reasons given for terminating the employment of the five grievors were the only reasons and they were untainted by any anti-union motive. Where as here the burden of proof rests with the employer, it will be the first to proceed with the calling of evidence. If the employer raises a *prima facie* defense that it had no knowledge of trade union activity coincident with its impugned actions, the burden shifts to the complainant to rebut the employer's defense. To that end, the complainant will have to adduce evidence of union activity and the employer's knowledge of the activity, or objective circumstantial evidence from which the Board may reasonably infer that the employer had knowledge of such activity. On the other hand, when a trade union seeks to be certified pursuant to section 8 of the Act without a representation vote, the legal burden of proof that the requisite conditions are present for the Board to exercise its discretion under that section to certify the trade union without a representation vote rests with the trade union. While that mixture of onus raises a question as to which party will proceed first, in the instant case the parties were agreed that the respondent would.

6. The Board heard the testimony of Emerson Gleason, Van Miller, William Tovey and Leslie Korom for the respondent and Giovanni Ledda for the union. Gleason, the respondent's plant manager, Miller, one of the three owners of the respondent and Ledda, an employee in wet processing gave their testimony on May 8th. At the conclusion of Ledda's testimony, the matters were adjourned on consent of the parties until 9:30 a.m. on July 10th. At the time the hearing was scheduled to commence, the union advised the Board that its witness, Mason Hiles, had not appeared. Matters were stood down until 10:00 a.m. When the Board re-convened the hearing at 10:00 a.m., Hiles still was not in attendance. The hearing proceeded on consent and, the union having no further witnesses to call, counsel for the respondent began to call reply evidence. By the time that the examination of Tovey, shift supervisor on the night shift, had been completed, Hiles was present in the hearing room. The union advised the Board that it had intended to have Hiles testify respecting its organizing campaign and the climate in the work place. Hiles is a grievor in the complaint in Board File No. 2981-83-U and had not been summoned to attend as a witness. The union requested leave of the Board to re-open its case and allow Hiles to testify. The Board heard and considered the submissions of the parties on the request and a majority of the Board, Board Member Collins dissenting, denied the request. The Board then heard the testimony of Korom, the respondent's director of manufacturing, and the submissions of the parties on the evidence and relevant law.

7. The Board has reviewed and weighed the evidence of the witnesses having regard to their recollection of the events about which they were testifying, the firmness of their recall,

their ability to relate clearly to the Board the events about which they were testifying, their ability to resist the influence of self-interest and their general demeanor. The Board is not going to set out detailed findings of fact, but, based on its review of the evidence and the submissions of the parties on the evidence and law, the Board concludes as follows.

8. The complaints that the respondent has violated sections 64 and 66(c) of the Act by terminating the employment of the five grievors implicitly allege that the employer did so because it knew or suspected that they were members of the union or were seeking to have the union represent them in their employment relations with the respondent. The respondent's defense to those allegations is that all five grievors were dismissed for just cause.

9. Blais, Hiles and Prempeh were fired on Friday, March 16th. The reasons given to Blais were that he had been taking repeated, extended rest and lunch breaks; he was unable to work in the respondent's dry blending operations because he was sensitive to the ingredients with which he had to work, thus he could not be transferred between wet blending and dry blending as work loads required from time to time; and he had not completed the respondent's probationary period of employment for new employees. Hiles and Prempeh were also on probation, but they were in a probationary term of employment because they had been re-employed in mid-January 1984, following earlier discharge. Their discharges preceded their re-employment by approximately one week and allegedly were for fighting with each other on company premises. Hiles was told that his discharge on March 16th was because his attitude since re-hire was not satisfactory; he was not following the respondent's prescribed procedures for blending ingredients and was wasting ingredients; and he was taking extended rest and lunch breaks. Prempeh was told that he was being terminated because he had not shaped up since his re-employment and because his work was slow. Partridge and Davis were fired on March 20th when they returned late from their meal break. During the 12 months immediately preceding these five discharges the respondent had discharged 13 employees, discounting the previous discharges of Hiles and Prempeh, for reasons of attitude, absenteeism, unsatisfactory work habits, careless operation of a vehicle, insubordination and fighting. The respondent is a new company, frequently employs relatively inexperienced employees and terminates employment if they are not satisfactory.

10. The respondent's evidence as to the reasons given for each discharge is uncontradicted. It remains to be determined whether those are the only reasons and whether the terminations were tainted by any anti-union motive.

11. Gleason, whose decision it was to discharge the five grievors; Miller, Tovey and Korom all denied any knowledge whatsoever of any union activity until the posting of the Board's notice to the employees about the application. The discharges preceded the posting. Their denials notwithstanding, if the discharges took place in the shadow of the union's organizing campaign and the respondent had knowledge of the campaign and knew or believed that any of the five grievors actively supported it, the Board could reasonably infer from that fact and from other objective circumstantial evidence that the decision to terminate the employment of the grievors, or any of them, was influenced at least in part by that knowledge. That inference would be sufficient to sustain the complaints.

12. The union seeks to have the Board draw such adverse inferences based on the coincidence of the union's campaign and the terminations, the employee meeting on March 19th, the posting of the newspaper clipping and the distribution of the letter.

13. The Board does not have direct evidence of the union's campaign or of the involvement in it of any of the grievors. Ledda believed Hiles and Blais to have been involved, but did not testify to the nature or extent of their alleged involvement. There is the documentary hearsay evidence of the membership documents filed by the union in support of its application. The dates of signature which these documents bear show employees to have been signed into membership between March 13th and 16th, with most of them having been signed on the 13th and 14th. As the Board noted above, the application was filed March 19th. The signature of the collector on all but four of the documents appears to be that of one of the grievors.

14. There was a meeting of the employees on Monday, May 19th. It was called at Miller's instruction and held between the day shift and afternoon shift. Miller addressed the employees and answered questions from them. One of the matters Miller addressed was a problem of employees taking extended rest and lunch breaks and the ultimate detrimental effect that it had on product quality and customer satisfaction. Miller related this problem directly to a serious complaint which he had to deal with on March 14th which put at risk continuing orders from a customer whose business represented 25 per cent of the respondent's total business. It was the next day, March 20th, that Davis and Partridge were discharged for returning late from their meal break on the evening shift.

15. The respondent received the Board's notice and posted it on March 21st. The next day Miller saw a newspaper clipping about an organizing campaign at an Eaton's store by a rival union to this applicant. After seeking legal advice, he posted a photo-copy of the article alongside the Board's notice. On March 23rd, he also sent a copy of it to each employee together with a letter stating that, amongst other things, the respondent held similar views to those expressed in the article.

16. The contents of the newspaper clipping and the respondent's letter to the employees, when considered in the context of the rest of the evidence before the Board are within the employer free speech limits of section 64 of the Act. Neither the article and letter nor the respondent's particular use of them create a breach of that section. Nor, in the absence of direct evidence of the union's organizing campaign or the grievors' involvement in it, does the simple fact of their discharges stand out as such an unusual event as would cause the Board to believe that the respondent had reasons for their discharges other than those given. There were conflicts in the evidence of Ledda and the respondents' witnesses with respect to the subject matter of the employee meeting on March 19th, but, having had the opportunity to hear their testimony and assess their demeanor, the Board prefers the evidence of the respondents' witnesses. The Board is satisfied on the evidence that there were no threats to job security, no promises of benefits to the employees and no reference to the union or its campaign made at the meeting.

17. In the result of all of the foregoing, the Board does not have any direct evidence that the five grievors, or any of them, were involved in the union's organizing campaign or that the respondent had knowledge or believed that they were involved in an organizing campaign for the union. There is no evidence to suggest that their terminations of employment were such an uncharacteristic response for the respondent that the Board would infer the existence of some other reason for the actions. In fact, the evidence before the Board suggests that the actions were not an unusual response. Nor is there any other evidence before the Board from which it is prepared to infer that the respondent had such knowledge. Thus the union has failed to rebut the respondent's *prima facie* defense that it had no knowledge of union activity when it made its decisions to terminate the employment of Blais, Hiles and Prempeh on March 16th and Davis and Partridge on March 20th. Therefore the Board finds that the respondent has

not violated sections 64 and 66(a) of the Act. One of the pre-conditions which must be established under section 8 of the Act before the Board has discretion to certify the union without a representation vote is for the employer to have violated the Act. Since the Board has found that there has been no violation of the Act, there is no basis for it to apply section 8 as requested.

18. Therefore the complaints in Board Files No. 2981-83-U and 3046-83-U and the request to apply section 8 of the Act to the application for certification in Board File No 2980-83-R are dismissed.

19. It remains, therefore, for the Board to determine the number of employees in the bargaining unit described in paragraph 1 who were members of the union at the making of this application. The lists filed by the respondent contain the names of 22 employees who were in the bargaining unit on the making of the application. The union has filed membership documents for 11 of those employees. Therefore the Board finds that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the application on April 17, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

21. Voters will be asked to indicate whether they wish to be represented by the applicant in their employment relations with the respondent.

22. It is unnecessary, therefore, for the Board to decide whether the petition filed in opposition to the application expressed the voluntary wishes of the employees who signed it, since if the Board were to give weight to the document, its effect would only be to cause the Board to exercise its discretion under section 7(2) of the Act to direct a representation vote had sufficient employees been members of the union for it to be certified without a vote.

23. This application is referred to the Registrar for conduct of the vote.

DECISION OF BOARD MEMBER L. C. COLLINS;

1. I heard the evidence at the hearing and my preference is for the evidence given by the union witness, Mr. Giovanni Ledda.

2. Based on his testimony, I would have drawn the inference that the company was aware of the union's organizing campaign, had promised benefits to the employees to keep the union out and threatened their job security if it was successful. Therefore, I would have ordered the reinstatement of the discharged employees, applied section 8 of the Act, and issued a certificate to the union.

0424-84-U Redvers C. Butler, Complainant, v. Inco Limited, Respondent

**Unfair Labour Practice — Unrepresented employees having involuntary severance plan
— Same benefit not extended to bargaining unit employees — Not unlawful discrimination**

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members M. Eayrs and N. A. Wilson.

APPEARANCES: *Redvers C. Butler and Robert Tracy for the complainant; Paul Jarvis and W. Gretton for the respondent.*

DECISION OF THE BOARD; November 15, 1984

1. The name of the respondent is amended to read: "Inco Limited".
2. This is a complaint under section 89 of the *Labour Relations Act* alleging that the respondent has violated section 66(a) of the Act.
3. Section 66(a) of the Act provides as follows:

"66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act."
4. The complainant, Mr. Redvers Butler, is a security officer employed by the respondent Inco Limited ("Inco") in the Sudbury area. Mr. Butler comes within a bargaining unit of security officers represented by the Canadian Guards Association, Local 105. Mr. Butler is not, however, simply a rank and file bargaining unit employee. He is also a senior union official, having held various offices in both the Canadian Guards Association and its Local 105. At the present time, Mr. Butler is the president of the Canadian Guards Association. Although Mr. Butler alleges that he has been discriminated against by Inco, he does not contend that this discrimination was the result of his activities on behalf of the union or his position as president of the Canadian Guards Association. Rather, he contends that he and all other security guards employed by Inco in its Sudbury District operations are being discriminated against because they are in a bargaining unit represented by a trade union.
5. There appears to be three major groupings of employees engaged at Inco's Sudbury District operations, namely production employees represented by the United Steelworkers of America, security officers represented by Local 105 of the Canadian Guards Association and salaried employees not represented by any trade union. There is very little evidence before us with respect to the terms of employment of employees represented by the United Steelworkers of America. We do know, however, that security officers represented by Local 105 of the Canadian Guards Association and the unrepresented salaried employees receive most of the same "fringe" benefits, such as a pension and various medical insurance plans. The benefits available to the security officers are enumerated in a subsisting collective agreement between Inco and Local 105. As might be expected, not all of the terms and conditions of employment

of the unorganized employees and the security officers are the same. For example, the collective agreement covering security officers provides that no security officer can be discharged except for just cause, and that any layoffs are to be in order of reverse seniority. Further, laid off employees retain certain rights of recall. The unorganized staff do not enjoy any of these protections. There is, however, one benefit available to the unorganized employees which is not now available to employees represented by either the United Steelworkers of America or Local 105 of the Canadian Guards Association, namely the ability to receive benefits under an involuntary severance plan.

6. Inco's involuntary severance plan has been in effect since 1971. Benefits under the plan are made available to non-bargaining unit employees who are terminated by the company. The plan involves the payment of a severance allowance based upon a terminated employee's years of service. The payments are made over a period of time. In cases where a terminated employee is also entitled to a company pension, the severance payments are "stacked" on top of his pension payments. There is nothing in the evidence to indicate that Local 105 of the Canadian Guards Association has ever sought through collective bargaining to have the severance plan apply to security officers.

7. In 1982, Inco decided to drastically reduce its workforce. One of the methods by which the company sought to do so was by encouraging employees to take early retirement. To this end, in early 1982 the involuntary severance plan was temporarily extended to cover early voluntary retirements. Further, coverage of the plan was unilaterally extended by Inco to cover employees represented by Local 105 of the Canadian Guards Association. In line with these temporary changes to the plan, the company advised all staff with over thirty years' service, including security officers, that if they opted to retire they would receive not only the pension due them, but also additional payments pursuant to the severance plan. Mr. Butler, who has been employed by Inco since 1948, was one of those to whom this offer was made. Mr. Butler testified that he was advised that if he accepted the offer, he would receive about sixty-five per cent of his normal retirement pension. Mr. Butler decided not to take the offer of early retirement.

8. Approximately 250 employees voluntarily agreed to accept early retirement, including nine security officers. In June of 1982, the original restrictions were imposed on the operation of the severance plan, so that once again it covered only unrepresented employees who were terminated against their wishes. Mr. Gretton, the manager of employee relations for Inco's Ontario Division, indicated that in certain instances where the company had decided that a redundant non-bargaining unit employee was to be let go, and an employee advised the company that he would like to be the one terminated, if it suited the company's needs, the company did select the individual in question.

9. As noted above, in 1982 approximately 250 employees, including nine security officers, agreed to take voluntary early retirement along with the severance payments. As far as Inco was concerned, this did not sufficiently reduce the workforce. Accordingly, a number of employees were involuntarily terminated and paid under the involuntary termination plan. Five security officers were laid off, the individuals being selected in accordance with the provisions of the applicable collective agreement. Although not obliged to do so under the collective agreement, Inco made severance payments to the laid-off security officers. Since that time, the company has continued to gradually reduce the size of its workforce. Some of this reduction has been by way of the termination of redundant employees, who have received payments under the involuntary termination plan. Most of the reduction, however, has been

by way of attrition. When an employee has retired or voluntary left the company's employ, Inco has generally redistributed the work so as to be able to avoid hiring a replacement. In testifying before the Board Mr. Gretton acknowledged that if a security officer were to leave the company's employ, he likely would not be replaced.

10. In March or April of 1984, Mr. Butler requested that he be allowed to retire early and receive not only the pension due him but also a severance allowance. This request paralleled the offer which Mr. Butler had rejected in 1982, although now with his greater service, under such a scheme he would be entitled to receive more money. Inco denied Mr. Butler's request, explaining that it was no longer open for employees to elect to retire early and receive the severance payments. When Mr. Butler protested that certain employees had recently left the company's employ and received severance payments on top of an early retirement pension, it was explained to him that these were employees who had been terminated by the company because their jobs had become redundant. Mr. Butler's response was that if he were to take early retirement, he would not be replaced, which demonstrated that he too was redundant.

11. Mr. Butler contends that if he were not in a bargaining unit he would be entitled to receive the benefits of the company's severance plan, and thus would be able to retire early and receive severance payments in addition to his pension. It is his contention that since he is not eligible to receive the severance payments, he is being discriminated against because he is represented by a trade union. Mr. Butler bases this submission on the general proposition that while employees represented by a union may enjoy benefits not received by unrepresented employees, it becomes a form of improper discrimination under section 66(a) of the Act for an employer to give benefits to unrepresented employees that are not also being received by employees represented by a trade union.

12. We are unable to accept Mr. Butler's general proposition. A trade union in negotiations with an employer may well decide to concentrate on certain matters, such as increased wages or seniority rights, and do so at the expense of other benefits which are enjoyed by unrepresented employees. The result does not necessarily mean that the employer is discriminating against employees represented by the trade union. In the instant case, Local 105 of the Canadian Guards Association negotiated a number of collective agreement clauses which limit the right of Inco to terminate security officers, restrict the company's ability to select who is to be laid off and give laid off employees certain rights of recall. Presumably, Local 105 has also negotiated wage increases for the employees it represents. There is no evidence, however, that the union has ever sought to bargain for a scheme of severance pay. Given these circumstances, the fact that the involuntary severance pay scheme does not apply to employees represented by the union does not, in our view, constitute a form of discrimination proscribed by section 66(a). We recognize that in certain instances a refusal by an employer to agree to provide unionized employees with benefits enjoyed by unorganized employees may be indicative of discrimination against employees because they have chosen to be represented by a trade union and/or a failure to bargain in good faith. The facts of this case, however, do not raise these concerns.

13. Our views set out above are sufficient to deal with this matter. We would note, however, that even if Mr. Butler was correct in his contention that the involuntary severance scheme should apply to bargaining unit employees, Mr. Butler would still not be entitled to payments under the plan. The reason for this is that he has not been involuntarily terminated, but rather continues to work for Inco. It is not up to Mr. Butler to declare himself redundant to the company's requirements. That is a matter for the company to decide. Further, even if

Inco were to decide that it had one too many security officers, the company would be required to follow the terms of the collective agreement in deciding which security officer would be laid off. It would not be open to Mr. Butler to unilaterally decide that he should be the one.

14. Having regard to the foregoing, we are of the view that no breach of section 66(a) of the Act has been made out. The complaint is accordingly dismissed.

2944-83-U United Food and Commercial Workers International Union AFL-CIO-CLC, Complainant, v. **Krinos Foods Canada Ltd.**, Respondent

Discharge for Union Activity — Unfair Labour Practice — Employees displaced by partial closure not offered available positions in other parts — Influenced by their union affiliation — Concerns as to grievor's work performance raised prior to arrival of union — Subsequent discharge not unlawful

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members A. Grant and B. Armstrong.

APPEARANCES: *James Hayes, Vincent Gentile and Stan Henderson for the complainant; E. Rovet G. Kanas and John Moscahlaidis for the respondent.*

DECISION OF THE BOARD; November 29, 1984

1. This is a complaint under section 89 of the *Labour Relations Act* alleging that the grievors, Axel Arana, Ilias Segounis, Ted Pantos, Rosalija Petrovic, Maria Morea and Rita Robibero have had their employment terminated in violation of the *Labour Relations Act*. Following the hearing and prior to the Board issuing an oral decision, the parties made one final effort to settle this matter. The Board has been advised, however, that these efforts have been unsuccessful.

2. The respondent company is an importer and distributor of Greek specialty foods. The business was begun in 1950 in New York by John Moscahlaidis. In 1963 a small plant was opened in Montreal, and in 1964 in Toronto, the Toronto plant subsequently moving to new premises in 1979. Mr. Moscahlaidis is still President of both the parent company and its Canadian subsidiary, and makes two or three visits each year to the Canadian locations.

3. The grievor Ted Pantos has been with the respondent in Toronto since 1966, and since the move to the new location in 1979 has been the individual responsible for the care of the company's cheeses. It would appear from the evidence of all witnesses (even allowing for a measure of over-statement on Mr. Moscahlaidis' part) that Mr. Pantos has been a good deal less than satisfactory in carrying out that responsibility. It appears that there has not been a trip to Toronto, since 1979, in which Mr. Moscahlaidis has not railed at length at Mr. Pantos over the spoiled condition in which he found the company's cheeses, in particular the feta cheese, which requires constant care and re-brining. At one point, apparently in 1982, Mr. Moscahlaidis left his general manager, George Kanas, with instructions to fire Mr. Pantos. When Mr.

Moscahlaidis next returned to Toronto, he asked Mr. Kanas if he had fired Mr. Pantos. Mr. Kanas replied: "Yes, but he doesn't believe me."

4. Mr. Moscahlaidis was aware that Mr. Kanas and Mr. Pantos went back a long way together, and that Mr. Kanas had a great deal of sympathy for Mr. Pantos, but took the view that Mr. Kanas was supposed to be his general manager in Toronto, and accordingly had the responsibility to carry out any firing that had to be done. To bring the seriousness of the situation home to Mr. Pantos, however, Mr. Moscahlaidis composed a letter in Greek from himself for Mr. Kanas to read to Mr. Pantos. The letter, which Mr. Kanas did read to Mr. Pantos, translates as follows:

January 11, 1983

When I came to Toronto and I saw the situation in respect with the feta cheese, I really got sick. The barrels have been left alone as they arrived from Montreal without being brined, and, of course, the cheese was ruined.

I have told Theodore repeatedly to brine the cheese but he did not listen and doesn't give a damn about the enterprise. The only thing he knows is to ask every year to increase his salary and he contributes nothing to the Company.

This situation cannot last longer and inform Theodore that either he must work harder or, better, let him go home, and we will find another person to work for us.

If Theodore decides to work harder and remain with the Company, then I expect him to brine all the barrels with feta cheese and those with the vine-leaves as well every month and generally to look after the refrigerators and the cheeses and to protect the merchandise.

The decision is not ours any longer but Theodore's.

This is my last warning.

"John Moscahlaidis"

5. Notwithstanding this letter, the situation with the cheese was, on Mr. Moscahlaidis' next visit in April, "terrible". By this time, the complainant union had filed an application for certification of the Toronto employees. Mr. Moscahlaidis testified that, having had a union in New York for 25 years, he was not particularly concerned about that, and told Mr. Kanas it was "his baby" to handle. While there is evidence that Mr. Kanas received a caution at this time from the labour counsel he retained in Toronto that it was not a good time to be terminating employees, there is no evidence that this advice was ever discussed or a factor with Mr. Moscahlaidis in deciding not to fire Mr. Pantos at that point. Rather, Mr. Moscahlaidis was about to depart for Europe, and, after railing at Mr. Pantos in the usual way, he agreed with Mr. Kanas to give Mr. Pantos until the end of the summer to rectify his performance.

6. Mr. Moscahlaidis testified that when he returned at the end of September, the situation with the cheese was *worse*. At that point, Mr. Moscahlaidis says he decided he could no longer leave the matter in Mr. Kanas' hands, and wrote to Mr. Pantos the following termination letter:

October 3, 1984.

Mr. Theodore Pantos
c/o Krinos Foods Canada Ltd.
251 Doney Crescent
Concord, Ontario L4K 1B1

Dear Mr. Pantos:

Many times during my previous visits to Toronto I told you personally that I am not satisfied with your work but Mr. George Kanas always intervened on your behalf and stopped me from terminating your employment with KRINOS-TORONTO.

On January 11, 1983 the situation that I found in the cheese department was intolerable. Many barrels of cheese and olives were completely spoiled due to your negligence. The place was filthy and I decided to write to you and, specifically, in Greek for you to clearly understand my feelings.

During my April visit, again I told you, orally, that you must change your attitude toward KRINOS if you want to continue our relationship. You must take care of the cheeses, clean all the coolers, and generally show some interest in your work.

I came to Toronto again after six months on September 29 and 30, and I found the following at the section of the business that you are responsible for:

1) The floors of all the coolers were filthy and cigarette butts were all over. When you were present and we were talking, I personally picked up from the floor many cigarette butts.

2) Racks and pipes were all over the coolers. They were filthy and had not been cleaned for months. If I were a health inspector, I would have closed this plant down on the spot. We went around together and I pointed to you all of the above. I asked you why? NO COMMENTS were made on your part.

3) Many tins of cheese were lying around and I asked you why they were not repacked since all cheeses are extremely perishable and especially the Feta. Your answer was that they had just come in. I knew from the exterior condition of the tins that your statement was not correct. I went to the office and I found out that this merchandise came into the plant on June 6 and June 15, entry numbers 1864 and 1981.

I did not stay to see the condition of the cheese, but I am sure that in many of the tins part or all of the cheese is completely spoiled.

4) Similarly, in the small cooler, were two barrels laying around for months with the cheese completely spoiled. Despite my many warnings of the past, my letter, and my oral warnings in April, you did nothing! You obviously do not care about this company. Therefore, you leave me with no other alternative that to tell you that it is better, to seek other employment. Your services are not desired by this company as of Friday october 28, 1983.

Very truly yours,
KRINOS FOODS INC.

John Moscahlaidis

And then:

Notwithstanding the company's view that your employment has been terminated for a cause, enclosed you will find a cheque for the amount of eight weeks salary, less normal deductions, which is being given to you to fulfill the requirements of the employment standards act.

However, this payment is made gratuitously and without admission of liability either at law or under the said employments act.

The words at the end were typed on by Mr. Kanas on the advice of Toronto counsel.

6. All of the other grievors in this complaint were let go on November 30, 1983, when the jar-line on which they were employed was permanently closed down. The evidence of Mr. Moscahlaidis is that the jar-line was opened at the new Toronto plant as an experiment, but that it proved to be wholly uneconomical in the face of the cut-rate selling prices of the Toronto area. That evidence is not challenged by the complainant. Rather, the complainant submits that the respondent deliberately manoeuvred all of the union supporters on to the jar-line so that they would be the ones to go when the jar-line had to be closed down.

7. The case is a little unusual in that, from the time of the initial campaigning for the vote directed by the Board, the employees have been visibly split into two identifiable "camps". Particularly after the vote was lost by the union, the four female supporters of the union, all of them being grievors here, were snubbed by the other female employees and always ate their meals on their own. Mr. Kanas, the general manager, verified in his evidence that this visible split amongst the employees had taken place, and that he had been informed after the vote that Mr. Pantos and Mr. Segounis were supporters of the union as well. Mr. Kanas testified that he was not aware of any other employee falling within this group of union supporters, and that it "could be" that his own demeanor towards this group had changed as well. But notwithstanding this, and the fact that all of the grievors except Mr. Pantos (who had been fired) were the employees on the jar-line when it closed, the evidence simply does not bear out the complainant's theory that the grievors were deliberately manipulated into that position by

the company. Mrs. Petrovic and Mrs. Robibera had been hired into these positions, as had Mrs. Morea, who was again recalled into that position in August of 1983. Mr. Segounis, another of the Union's group of supporters, had been designated from the outset as the "leader" in charge of the jar-line, and it was *he*, not the company, who directed Mr. Arana to report to the jar-line after the latter's recall in August. The recall of both Mrs. Morea and Mr. Arana to existing vacancies was pursuant to the terms of settlement of a section 89 complaint before the Board, and Mrs. Morea was recalled a short time after another female employee on the jar-line, Mrs. Marsili, was transferred to a vacancy in the fyllo department. The recall of Mrs. Morea was to be on the basis of seniority. Mrs. Marsili, the employee transferred to the fyllo line, has only marginally less seniority than either Mrs. Robibera or Mrs. Petrovic, and more than Mrs. Morea. The Board finds on the evidence that when the supervisor of the fyllo department, Mr. Alexakis, found that he needed another employee in his department, it was left to him to select "the best person available", and his choice of Mrs. Marsili was based solely on his own assessment of her, in accordance with company practice. Mr. Kanas was not involved at that initial point, but only became involved when he learned of the need to hire an additional employee for the jar-line. At that point, Mr. Kanas decided that Mrs. Morea should be recalled in accordance with the earlier terms of settlement. On all of the evidence, the Board does not find that the particular staffing of the jar-line as of November 30th was the result of anti-Union *animus*.

8. The complainant also challenges the fact that when the jar-line did come to be closed on November 30th, the employees there were not allowed to exercise their seniority to bump into jobs elsewhere in the plant. The complainant acknowledges that it is dealing with a non-union plant, but points to the terms of settlement of the section 89 complaint as recognizing with respect to the recall of Mrs. Morea and Mr. Arana the principle of seniority. On the evidence, however, that is not the way that lay-offs have historically been handled. Except when only a part of a department was being sent home, the lay-offs have always been by department, and no re-arranging of the work force by seniority has ever taken place. None of these prior lay-offs involved the *permanent* closure of a line, and hence are not equivalent to the present terminations, but they are the best indication available of how this company looks at the problem. We in general find nothing suspicious, therefore, in the way in which the lay-off of November 30th was handled; that is, with the whole department which had become redundant being the ones to be let go.

9. The one exception to this is the case of Mr. Segounis. Mr. Segounis had a great deal of experience in the respondent's operation, and generally had been used by the respondent to start up and to provide the leadership in particular areas of the plant. In light of his experience and apparent value to the respondent, the failure of the respondent to move Mr. Segounis elsewhere in the plant when the jar-line closed down requires further explanation. The evidence that Mr. Kanas gave was that in 1982 and early 1983 he had formed the suspicion that Mr. Segounis was stealing from the company, and was happy to have an excuse to lay him off in November, rather than have to confront him on the theft allegation. But no mention of this consideration was made in the company's lengthy reply to this complaint, nor at any time prior to Mr. Kanas giving his evidence. If in fact this suspicion was a consideration at all for Mr. Kanas, we do not accept his evidence that it was a significant one. Rather, we find it more consistent with the way other supporters of the union were treated after their lay-off (discussed *infra*) that Mr. Segounis' union affiliation was, consciously or otherwise, the controlling factor in Mr. Kanas' decision to lay Mr. Segounis off.

10. With respect to the other laid-off grievors, the company in December of the same year acquired a candy-line business from an outside family, and along with the members of that family, incorporated that business into its plant. When in January the former owners of the candy-line indicated to Mr. Kanas that they needed additional unskilled employees to cut and pack on that line, Mr. Kanas told them to go out and hire anyone they knew. As a result, a male employee was hired on January 11, 1984, and two females on January 23 and 30. Mr. Kanas conceded in his evidence that, in retrospect, there was no reason why the employees laid off from the jar-line could not have been re-hired to do that work, if Mr. Kanas had "turned his mind" to it. We find that the only reason why Mr. Kanas failed to "turn his mind" to it was his distaste for these former employees because of their support for the union. The company also hired a janitor and a cheese helper on March 19, 1984, both being jobs Mr. Kanas concedes Mr. Arana was capable of doing. Once again we find that it was Mr. Arana's union affiliation which stood in the way of Mr. Arana being considered.

11. The case of Mr. Pantos is more difficult. While the support of certain employees for the union we find was clearly a factor that was influencing Mr. Kanas, the concern over Mr. Pantos arose from Mr. Moscahlaidis, and it was clearly Mr. Moscahlaidis who decided ultimately to take the step of firing Mr. Pantos on his own. Mr. Kanas was the senior management official most directly associated with the Toronto employees and responsible for their actions; it is not inconceivable, therefore, that any sense of "betrayal" or resentment on the part of Mr. Kanas concerning the employees' efforts to bring a union into Toronto did not extend to the level of Mr. Moscahlaidis in New York.

12. Mr. Moscahlaidis' own evidence is that he had lived with a union in New York for many years, and was not overly concerned about the fact that efforts were being made to organize a union in Toronto, treating it rather as a matter for the manager responsible for Toronto to deal with. There is nothing in the evidence to suggest anything to the contrary. While the Board is not naive in assessing the response of employers to pending unionization, nothing the company did in April, when Mr. Moscahlaidis visited the location and the application had already been filed, demonstrated an anti-union *animus* on the part of Mr. Moscahlaidis. Rather, Mr. Moscahlaidis appears to have paid very limited attention to matters in Toronto prior to his departure for Europe, and left matters generally to be dealt with upon his return. Had the letter of January 11 not made it evident that Mr. Moscahlaidis' patience was finally running out, before any union organizing activity had taken place on the part of anyone, the timing of Mr. Pantos' discharge alone would have made it extremely difficult for the respondent to satisfy the reverse onus upon it. But that letter, together with the corroboration by various other employees who testified, including fellow grievors, of the problems Mr. Moscahlaidis had had with Mr. Pantos, the lack of any discernible anti-union reaction to the certification attempt on the part of Mr. Moscahlaidis himself, and the absence of any involvement of Mr. Moscahlaidis in the "tainted" handling of the other grievors by Mr. Kanas, persuades the Board to accept Mr. Moscahlaidis' explanation of why the letter of January 11th was not acted upon until September. The complaint with respect to Mr. Pantos is accordingly dismissed. The Board need not deal, therefore, with the respondent's argument concerning the complainant's delay of almost six months in characterizing the discharge of Mr. Pantos as an unfair labour practice and placing the matter before the Board.

13. The foregoing are the essential findings which the Board has been called upon to make with respect to liability in these proceedings. Counsel for the complainant suggested in argument that once that were done, the parties themselves might be in the best position to work out the appropriate remedies which should flow. Given the number of grievors and the variations

in their claims, that suggestion appears to us to have considerable merit, notwithstanding the substantial efforts already undertaken by the parties, in the absence of a definitive Board ruling, to settle this matter between them. The parties will accordingly be afforded an opportunity to agree upon the appropriate manner of implementing the effects of this decision, with the Board remaining seized in the event that the parties are not able to do so.

1676-84-M Old Mill Restaurant (Old Mill Investments), Employer, v. Hotel Employees Restaurant Employees Union, Local 75, Trade Union

Conciliation — Union unable to establish it gave notice for renewal in timely manner — Minister not having authority to appoint conciliation officer

BEFORE: Paula Knopf, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray.

APPEARANCES: *W. R. Thornton and K. Shukler for the employer; Kevin Whitaker, George Pineo and Gerry Jones for the trade union.*

DECISION OF THE BOARD; November 28, 1984

1. This is a reference under section 107 of the *Labour Relations Act* wherein the Minister has asked for a ruling regarding his authority to make an appointment of a conciliation officer under section 16 of the Act. The Board gave the parties an oral ruling at the conclusion of the hearing of this matter. Therefore, this decision represents a reiteration and an amplification of that ruling and its reasons.

2. The parties have enjoyed a collective bargaining relationship for approximately twenty years. Their most recent collective agreement was due to expire on June 30, 1984. The expiry clause of the collective agreement provided:

ARTICLE 20 — TERMINATION OR MODIFICATION

- 20.01 This agreement shall be in effect until the 30th day of June, 1984 and unless either party give notice in writing to the other party that amendments are required or that the party intends terminating the agreement, then it shall continue in effect until the 30th day of June, 1985, and so on from year to year thereafter.

The issues in this case have arisen because the employer claims it never received a notice of the union's desire to bargain for a new collective agreement within the statutory or the collective agreement time period provided for the giving of such notice. The position of the union was that it sent a notice of a desire to bargain for a new contract to the employer by way of a letter dated April 18, 1984 and that this letter was sent by registered mail. Alternatively, the union argued that it had given notice in writing pursuant to the collective agreement by sending the notice by ordinary mail and that the employer was aware of this, therefore the collective

agreement requirements to reopen negotiations had been satisfied. Finally, the union relied on section 113(5) of the Act by saying that since the notice was sent by registered mail, any problems with lack of receipt by the employer were cured when the union delivered a second copy of the original notice to the employer on July 11, 1984. Section 113(5) of the Act provides:

Where a notice has been given under section 53 by registered mail and the addressee claims that he or it has not received the notice, the person, employers' organization, trade union or council of trade unions that gave the notice may give a second notice to the addressee forthwith after he or it ascertains that the first notice had not been received, but in no case may the second notice be given more than three months after the day on which the first notice was mailed, and the second notice has the same force and effect for the purposes of the Act as the first notice would have had if it had been received by the addressee.

3. The employer's position was that the onus is upon the union to establish if and how the notice was sent and that the evidence presented by the union did not satisfy that onus either under the Act or the collective agreement.

4. After reviewing the testimony and the documentary evidence received in assessing the demeanor and credibility of the witnesses for both parties, this Board concluded that the following facts had been established. It may be the regular practice for the union's office to send notices of desire to bargain for new collective agreements by registered mail. However, it is certainly not always the case that this is done this way. The actual copy of the purported notice produced in this case had no indication on its face that it was sent by registered mail. Although other union correspondence does indicate if it was "delivered by hand" or sent by "registered mail", no union witness testified as to how the particular notice in this case had been sent. But this is not surprising given the volume of mail going from any busy office. However, the union did produce a "postal receipt" which records the sending of registered letters from the union's office and which included a listing of a letter sent to the employer. The postal receipt is apparently signed by a postal employee, but it is undated and unstamped by the Post Office. The union's Business Agent's explanation for the lack of stamp or date is that the union produced the only copy that the office has of the receipt and that it is in fact the third page copy of that document. The Post Office retains the first two copies. The lack of date and Post Office stamp is, in the union's belief, attributable only to the Post Office's error. The union produced its book of postal receipts for registered mail dating back to March, 1984. It contained approximately 100 such receipts. One other receipt was undated. Two others had date stamps but no signatures. All the rest of the receipts were complete. In any event, the undated receipt was offered as proof that the notice had been sent by registered mail. No one from the Post Office nor any Post Office original records were subpoenaed or produced to the Board.

5. In any event, in June of 1984, the union's shop steward, Mrs. Weseley, had conversations about the question of notice with Mr. Shukler, the employer's representative in charge of collective bargaining. We conclude that these conversations took place on two different days before the contract expired on June 30th. The first conversation was a brief one within the last two weeks of June when Mr. Shukler mentioned to Mrs. Weseley in passing that he had not received a notice to bargain and asked if she knew why. She promised to get in touch with the union representative. It took her a few days to make contact with her representative, Gerry Jones. When she told Mr. Jones that Mr. Shukler had not received notice, Mr. Jones told her that it had already been sent out. She took his word for it and did nothing further about it.

Mrs. Weseley then spoke to Mr. Shukler about the question of notice on June 28th when Mr. Shukler again raised the issue and told her that he had still not ofreceived the notice. She recalled him advising her to get back in touch with the union. Mrs. Weseley did get in touch with Mr. Jones that afternoon and Mr. Jones again said that the notice had been sent out. He suggested that if there was still a problem Mr. Shukler should get in touch with him. Mrs. Weseley told this to Mr. Shukler the same day. Later that afternoon, Mr. Shukler told Mrs. Weseley that he had spoken to Mr. Jones but that Mr. Jones had simply reiterated that the notice had already been sent out.

6. The union took no steps to redeliver a notice or to ensure delivery of a notice to the employer before June the 30th. No proposals had been sent to the employer before June 30th, nor indeed have any been sent to date. No attempt to commence bargaining had been made by the union prior to June 30th because the union wanted to wait to commence bargaining with the aid of a conciliator.

7. A further conversation took place between Mr. Jones and Mr. Shukler on July 3rd, the first business day after the collective agreement expired. An argument ensued between the two men about the issue of notice and whether the employer was willing to commence bargaining. The union next decided to advise the company owner personally about the situation because of an earlier undertaking to that effect. The application for conciliation was then filed by the union on July 10, 1984. Then, on July the 11th, a copy of the purported original notice of the desire to bargain was delivered by hand to the employer.

8. Mr Whitaker, agent for the union at this hearing, properly characterized the issues in this case as being the following:

- (1) Was timely notice sent by registered mail?
- (2) Did the notice delivered on July the 11th comply with section 113(5) of the Act?
- (3) Was a timely notice sent by the union?
- (4) Did the employer in fact receive notice by way of the April 18th letter?

9. The onus is on the union to show if and how the notice was sent. Section 53 allows for notice to be given within either a statutory or collective agreement time period:

53.-(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

There is no question that if the union had been able to establish that notice was given in any

way on or about April 18, 1984, it would have been a timely notice within the dictates of the statute or the parties' collective agreement.

10. However, the Board was not satisfied by the evidence presented that the notice of desire to bargain for a collective agreement was given by way of registered mail. The union's evidence was simply not sufficient. The receipt produced was undated and could not reliably be related to the copy of the April 18th letter which the union produced. No original Post Office receipts or documents indicating registration, delivery or lack of delivery were either subpoenaed or produced. Copies of other letters referred to on the undated Post Office receipt were not produced although they could have helped to have fixed the date. In addition, the Board felt concerned about the fact that another page of registered receipts is contained in the union's book for April 18, 1984 which is both dated and signed by the Post Office. The union's book contains no other instance of having two pages of registered receipts for the same day. Adverse inferences must be drawn from the lack of evidence and when this is combined with our concerns mentioned above about some of the evidence, the Board was forced to conclude that the evidence had not established that a notice had been sent by registered mail by the union.

11. If we had concluded that notice had been sent by registered mail but was simply not received by the employer, section 113(5) of the Act could have assisted the union because of the delivery or re-delivery of a notice on July the 11th. However, section 113(5) only applies where the notice was given by "registered mail" in the first place. Having been unable to conclude that the notice was given by registered mail, section 113(5) can have no application in the circumstances of this case.

12. Therefore, the next issue to address was whether timely notice was given or sent at all. In this regard, the union simply was not able to satisfy the onus upon it. The evidence given by the Business Agent of how he determines when to give notice was confusing and could have easily been corroborated by the records he referred to as his "expiry book" or his daily calendar which apparently recorded the intention to give notice. Neither was produced as evidence. Further, there were startling and significant differences between the testimony of Mrs. Weseley and Mr. Jones regarding their conversations in the last two weeks of June. To mention only a few examples, they differed on when they spoke together, whether they agreed that Mr. Jones would call Mr. Shukler or vice versa, and on what Mr. Shukler allegedly said to Mrs. Weseley. Where there was any difference between Mrs. Weseley and Mr. Jones, we preferred the evidence of Mrs. Weseley as being the most plausible, internally consistent and credible. Her evidence established clearly that the union had been notified prior to the expiry of the contract that the employer had not received notice and yet the union took no steps to ensure that notice was delivered before the contract expired. The onus is on the union to establish that timely notice had been given. However, the evidence before the Board was simply that despite a virtual invitation by the employer through Mr. Shukler to the shop steward to ensure that notice was delivered before June 30th, the union took no steps to give notice before July the 11th. This cannot be considered to be timely notice within the terms of the collective agreement or the statute. Further, the union's evidence of office procedures was insufficient to establish that notice was sent by ordinary mail or any other means. Therefore, there was no satisfactory evidence before the Board to prove that any timely notice was in fact sent to the employer.

13. Finally, the evidence of the union itself through Mrs. Weseley and Mr. Jones establishes that the employer was stating clearly that as of the last two weeks of June it had not received any notice of the union's desire to bargain for a new collective agreement. This was confirmed

by Mr. Shukler himself in his testimony. Therefore, the only plausible conclusion to be reached is that the employer did not in fact receive notice by way of the April the 18th letter.

14. As a result of the foregoing, we must conclude that no timely notice of the desire to bargain for a new collective agreement was given by the union to the employer in compliance with section 53(1) or (2) of the Act. The Minister's authority to appoint a conciliation officer to assist the parties arises from section 16(1) of the Act:

16.-(1) Where notice has been given under section 14 or 53, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(2) Notwithstanding the failure of a trade union to give written notice under section 14 or the failure of either party to give written notice under sections 53 and 122, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

Since the evidence does not establish compliance with section 53 and no bargaining has commenced, the Minister therefore has no authority to accede to the union's request to appoint a conciliation officer under section 16 of the Act.

1399-84-U Kazik Pawlak, Complainant, v. Tom Cope, Local Union 1151, Millwrights, United Brotherhood of Carpenters and Joiners of America and Millwright District Council of Ontario, Respondents

Duty of Fair Referral — Unfair Labour Practice — Interpretations of both complainant and union of by-laws relating to name rehire not unreasonable — Referral made according to longstanding union practice — No breach of Act

BEFORE: Harry Freedman, Vice-Chairman.

APPEARANCES: *Kazik Pawlak and Owen F. Lindsay for the complainant; J. D. Watson, Tom Cope and Gary Robinson for the respondents.*

DECISION OF THE BOARD; November 8, 1984

1. The names of the respondents appearing in the style of cause in this matter are amended to read: "Tom Cope, Local Union 1151, Millwrights of the United Brotherhood of Carpenters and Joiners of America and Millwright District Council of Ontario".

2. Kazik Pawlak filed a complaint under section 69 of the *Labour Relations Act* alleging that the respondents had discriminated against him by not referring him to a job with EKT Industries Inc. at Terrace Bay on July 27, 1984, and by referring Mike Nephin, another member of Local 1151, United Brotherhood of Carpenters and Joiners of America, hereafter referred

to as the "Union", to that job when he was lower than Mr. Pawlak on the hiring hall list. Mr. Pawlak relies on an alleged violation of the Union's by-laws by the respondent Tom Cope, the Business Representative of the Union to support his allegations.

3. Mr. Pawlak submitted that this complaint was filed because he believed that the respondents Cope and the Union had applied the hiring hall rules contained in the Union's by-laws in an inconsistent manner. He referred to an incident in January 1984 where both he and Owen Lindsay, another member of the Union had been recalled by name, that is by name re-hire, to work at a job for Moore Industrial Installations. At that time, Mr. Cope wanted to refer a union steward to work at that Moore Industrial Installations job in place of one of the persons named by Moore for re-hire. As a result of Mr. Cope's attempt to refer a steward to that job, Mr. Pawlak and Mr. Lindsay wrote to the President of the Union (see Exhibit #2) and asked that charges be laid against Mr. Cope under the Union's by-laws.

4. The President of the Union, Gary Robinson, replied to the complaint of Messrs Pawlak and Lindsay by letter dated March 8, 1984. That letter, Exhibit #5, stated in part as follows:

Your letter was discussed at some length between myself and the other Executive members, excluding Brother Tom Cope, at the Executive meeting on March 7.

The general consensus of the Executive was that Brother Tom Cope's actions did not warrant any charges being laid. This should not deter you from proceeding with the laying of charges by yourself and/or Brother Owen Lindsay if you so desire and see fit.

The Executive felt that the following reasons supported this resolve:

- (i) Section 43.07 (c) establishes that THE MEMBER may return to work for a contractor he has been employed with if 30 days have not elapsed. The employer HAS NO RIGHT to recall the persons he wishes to. The Business Agent must call the members laid off from that job before he calls anyone else (providing they haven't worked).
- (ii) Upon lay-off the Steward naturally assumes the highest seniority. Upon recall he is the person who should have been recalled first. If the Business Agent erred it was probably by allowing someone other than the Steward to return to the job before the Steward.
- (iii) The by-laws form an integral part of our Union's administration — they are, however, not for use outside our Brotherhood and cannot be binding upon us by a Contractor.
- (iv) Section 36 refers to discrimination vs. any member. If any person was discriminated vs. it would have to be T. Morden since he should have been the first to return.

If Brother T. Cope deserves to be reprimanded for any action, I feel it would have to be for not informing Mr. Stoppa that the Company has not the right

of recall and that Brother Tom Morden should have been the first member dispatched from the hall.

Should you wish to change or alter the by-law in respect to who should be recalled first or if you wish to establish an order in which they should be recalled you should bring your proposal to the meeting next Wednesday, March 14.

There may indeed be times when the previous steward is of no benefit to either the Union or the Company on a project. Management should contact the Local Union office and discuss the problem in the event of a recall to work but in any case, the final decision must lie in the hands of the Business Agent.

5. Section 43 of the Union's by-laws (Exhibit #3) sets out in some detail the hiring hall rules of the Union. Section 43 provides in part as follows:

SECTION 43 — MILLWRIGHT HIRING PROCEDURE:

43.01

In order to promote equal opportunity for employment among the Millwright members of Local 1151, a list of unemployed members registering for employment is to be kept up to date at the Union Office. Reference in this hiring procedure to Millwright shall include Foreman, Millwright, Millwright Apprentice and Welders employed in the Millwright trade and they shall register as such but this shall in no way prevent a member, except an apprentice, from accepting employment as a journeyman Millwright.

43.02

A list of unemployed members registering for Millwright employment is to be kept up to date in the office, starting with the longest unemployed at the top of the list, if tie date, member holding longest continuous membership in accord with the seniority list shall qualify as first out.

43.04

All members must register within four (4) calendar days of termination of employment. The termination date to be entered on the list. Members failing to register within four calendar days will have the date of registration entered on the list.

43.07

A member called for Millwright employment to perform work under the current Provincial Agreement or Millwrights registered as Welders refusing three calls for a job shall go to the bottom of the list and shall not be eligible for Supplementary Unemployment Benefits.

- (a) No member having refused a specific job will be called for calendar days unless he requests a further call.

(b) No member will be penalized for refusing to go back to a job where he was fired.

(c) *In the event of a layoff for any reason, the members laid off will be given the opportunity to go back to that job if the contractor rehires within thirty (30) calendar days, providing that members laid off have not been employed by another contractor within this thirty (30) calendar day period.*

[emphasis added]

(d) All members registered as Millwright Welders must hold a valid Canadian Welding Bureau Certificate.

43.10

A member called for employment shall be advised of all orders for Millwright employment known to the Union at the time such call is made. The Millwright called shall have a choice of referrals available and if no referral is accepted, then a refusal of each job shall be registered against him.

43.11

Contractors may name hire the first Millwright Employee as Foreman for each project.

43.15

A Millwright referred to a job lasting 36 working hours or less may retain his position on the hiring list providing he does not quit his job.

6. The Board received evidence that the Union, in applying these hiring hall rules, has permitted an employer to request specific Union members for re-hire to a job if that member has worked for that employer on that job within the 30 days prior to the request. The Union has generally complied with an employer's request, provided the person requested has not worked elsewhere. That was the practice of the Union since it was chartered in 1982. When the Union was chartered, the millwright members of the Union's sister local, Local 1669, United Brotherhood of Carpenters and Joiners of America became members of the Union. That practice was also followed in dispatching millwrights to jobs from at least 1970 when the millwrights were members of Local 1669. The by-laws of the Union were drafted by a by-law committee of that Union which borrowed extensively from the by-laws of Local 1669. The Board is satisfied that it was the normal practice of the Union to permit the name re-hire of millwrights under section 43.07(c) and that that practice had been in place since the creation of the Union and since at least 1970 in respect of millwrights referred to jobs by Local 1669.

7. After Mr. Pawlak received the letter of March 8 from Mr. Robinson, he thought that the Union's practice with respect to name re-hire had changed.

8. At the regular membership meeting of the Union on March 14, 1984, the issue of an employer's right to name hire was raised. Mr. Lindsay testified that at the meeting, he spoke in favour of permitting employers to name hire, but did not recall whether the issue of name re-hire was discussed. Mr. Robinson, who chaired the March 14, 1984 meeting, testified that he recalled that Mr. Pawlak attempted to put the issue of name re-hire before the membership

along with the motion dealing with name hire. However, the specific issue of name re-hire raised by Mr. Pawlak was not put to the membership. The attempt by those at the meeting in favour of permitting name hire to amend the Union's by-laws was defeated. Mr. Robinson testified that the result of the March 14, 1984 membership meeting was to maintain the current practice when referring members from the hiring hall.

9. Mr. Pawlak filed this complaint because Mr. Cope, in response to a request from EKT Industries Inc. for millwrights to work at the Terrace Bay job referred Mr. Nephin to that job instead of Mr. Pawlak. Mr. Nephin was lower than Mr. Pawlak on the hiring hall list. (See Exhibit #1). Mr. Cope referred Mr. Nephin to that job because Dennis Magne, the Manager of EKT Industries Inc. had specifically requested for name re-hire for July 27, 1984 the millwrights who had previously worked on a specific machine, the slasher, at the Terrace Bay job and had been laid off on July 3, 1984. Mr. Nephin had worked on the slasher at the time of his lay-off on July 3, 1984 and was specifically requested for name re-hire by Mr. Magne. Approximately 44 millwrights had been employed by EKT Industries Inc. on the Terrace Bay job and approximately 40 had been laid off that job on July 3, 1984. Mr. Pawlak, who had also worked at the Terrace Bay job but did not work on the slasher which required millwrights on July 27, 1984, was also laid off on July 3, 1984.

10. Mr. Pawlak, who does not dispute the evidence of the Union's normal hiring hall practice, argues that he should have been referred to the Terrace Bay job on July 27, 1984 because he was ahead of Mr. Nephin on the list. As both he and Mr. Nephin had been laid off from the same job at the same time, Mr. Pawlak, being more senior to Mr. Nephin and therefore higher on the hiring hall list, should have been referred to the EKT Industries Inc. job at Terrace Bay ahead of Mr. Nephin pursuant to section 43.02 of the Union's by-laws. Mr. Pawlak relies on Mr. Robinson's letter of March 8, 1984 as further support for his position that employers could no longer name re-hire.

11. The parties agreed that the collective agreement binding on the Union and EKT Industries Inc. does not contain a provision giving employers the right to name re-hire. Mr. Robinson explained that his letter meant that an employer did not have the enforceable right under the agreement to demand name re-hire, and whether the Union complied with an employer's request for name re-hire was a matter within the union's discretion.

12. In my opinion, while Mr. Pawlak's interpretation of the Union's by-laws is not unreasonable, the Union's hiring hall practice relating to name re-hire has generally been the same since the creation of the Union and had generally been followed by its predecessor sister Local for many years. A member's place on the list does not affect whether that member is referred to a job through name re-hire. Both Mr. Pawlak and Mr. Lindsay agreed that Mr. Nephin's referral was consistent with the Union's general normal practice prior to March 8, 1984. I view the union's general practice with respect to name re-hire as understood by Messrs. Pawlak and Lindsay to be a reasonable application of the by-laws.

13. The Union's hiring hall practices are well known to all of its members and are set out in the by-laws. The hiring hall lists and job referral records are open for inspection by the Union's members. Any members questioning a referral can and have taken up their concerns with Mr. Cope. In my view, the hiring hall practices of the Union as administered by Mr. Cope is the antithesis of a hiring hall that is operated arbitrarily, discriminatorily or in bad faith.

14. The Board's jurisdiction in this type of complaint, which alleges a violation of section 69 of the *Labour Relations Act*, is to determine whether a union that selects or refers persons to employment pursuant to a collective agreement has acted in bad faith, or in an arbitrary or discriminatory manner. Whether Mr. Pawlak's interpretation of the by-laws or the Union's interpretation of the by-laws is correct, both are reasonable. Furthermore, I am satisfied that the Union's hiring hall practices had not changed in March of 1984, and that Mr. Nephin was referred to the EKT Industries Inc. job instead of Mr. Pawlak because Mr. Cope was following the Union's normal hiring hall practice in relation to name re-hires. Mr. Robinson's letter did not change that practice. The motion to amend the by-laws at the Union's membership meeting of March 14, 1984 was defeated. I find that the union membership meeting did not change the previous practice of name re-hire with which Mr. Pawlak and the other members of the union were familiar. Thus, I am satisfied that none of the respondents have acted in bad faith towards Mr. Pawlak, and were neither arbitrary or discriminatory in their treatment of him when the Union referred Mr. Nephin to the EKT Industries Inc. job at Terrace Bay on July 27, 1984 instead of Mr. Pawlak.

15. The complaint is dismissed.

1851-84-R Laundry and Linen Drivers and Industrial Workers Union, Local 847, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Satin Finish Hardwood Flooring (Ontario) Limited**, Satin Finish Hardwood Flooring Limited, Respondents

Practice and Procedure — Representation Vote — Applicant relying on s.1(4) seeking unit encompassing two employers — Respondents claiming third employer also related — Whether hearing to resolve dispute necessary before directing pre-hearing vote — Whether voting constituency including employees of two or three employers

BEFORE: Owen V. Gray, Vice-Chairman and Board Members W. G. Donnelly and W. F. Rutherford.

DECISION OF THE BOARD; November 8, 1984

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken. In accordance with its usual practice, the Board by order dated October 17, 1984, appointed a Labour Relations Officer to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of an appropriate bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date for the purposes of any vote which might be directed and other matters relating to entitlement to and arrangements for such a vote. The Labour Relations Officer so appointed met for these purposes with representatives of the parties on October 26, 1984. The parties were not then in agreement on a description either of the appropriate bargaining unit or of a voting constituency for the purpose of any

pre-hearing representation vote which might be ordered. The parties' solicitors have set out their positions in writing in letters now filed with the Board.

2. In its application for certification, the applicant asks for certification as bargaining agent of employees in the following bargaining unit, which it claims to be appropriate for collective bargaining:

All employees of the Respondent in the municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foremen, office, sales and accounting staff and security staff.

It is apparent from the application, and from the subsequent representations of the applicant, that the words "the Respondent" as used in this bargaining unit description refer collectively to the respondents Satin Finish Hardwood Flooring (Ontario) Limited and Satin Finish Hardwood Flooring Limited, whom the applicant claims should be treated as constituting one employer for the purposes of the Act by reason of their carrying on associated or related activities or businesses under common control or direction within the meaning of subsection 1(4) of the *Labour Relations Act*.

3. Each of the two respondents has filed a reply in which it claims that the unit of employees appropriate for collective bargaining should be described as follows:

All employees of Finished Woodfloor Ltd., Satin Finish Hardwood Flooring Limited and Satin Finish Hardwood Flooring (Ontario) Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and accounting staff.

Each of the respondents states that its business is "fundamentally bound" to the businesses of Finished Floorwood Ltd. and the other respondent. Each respondent states that its business "is associated or related to the business of Finished Floorwood Ltd. and [the other respondent], all of which businesses are under common direction and control . . . ", and each respondent requests that the Board make a declaration that all three corporations constitute one employer for the purposes of the Act.

4. It appears to be common ground that the employees for whom the applicant seeks certification all work at premises occupied by both named respondents at 8 Oak Street in Weston, Ontario. It also appears to be common ground that employees of Finished Floorwood Ltd. perform their work at a separate location at 50 Penn Drive, Weston, Ontario.

5. The respondents' position is that the voting constituency should include employees of Finished Woodfloor Ltd. in addition to employees of the respondents named in the application, and that the Board should not order any pre-hearing representation vote unless it is satisfied that the applicant has the requisite membership support among employees in that broad voting constituency. In the alternative, the respondents say they should be treated as separate employers for the purposes of the Act. It would follow from that alternative position that employees of each respondent would constitute a separate appropriate bargaining unit.

6. The applicant trade union takes the position that the appropriate bargaining unit encompasses all employees of both named respondents employed at 8 Oak Street, Weston, Ontario, and that the named respondents should be treated as a single employer in that respect.

Without conceding the respondents' allegation that they and Finished Woodfloor Ltd. should together be the subject of a related employer declaration pursuant to subsection 1(4) of the Act, the thrust of the applicant's position is that the respondents' relationship with Finished Woodfloor Ltd. is of no consequence because the appropriate bargaining unit would be limited to employees employed at 8 Oak Street, no matter who may be their employer for the purposes of the Act. It should be noted that a separate application for certification with respect to the employees of Finished Woodfloor Ltd. was filed by the applicant trade union on the day it filed this application (Board File No. 1870-84-R). A pre-hearing representation vote was also requested in that application, and the same Labour Relations Officer was appointed for the same purposes and met with the parties on the same day as is the case in this application. The applicant sought leave to withdraw that application in the course of the meeting. The respondent opposes the request for leave to withdraw, and asks that the application be dismissed and a bar imposed pursuant to section 103(2)(i) of the Act. Those are matters which will be dealt with by the Board in a separate decision disposing of that application. Whatever the disposition, it is apparent that the applicant is not seeking to represent employees of Finished Floorwood Ltd., and the possible participation of those employees in a vote comes into issue only as a result of the position taken by the respondents to this application.

7. In his written submission to the Board, counsel for the respondents takes the position that there must be a Board hearing before the pre-hearing vote proceeds:

... It is fundamental however, that that vote not proceed until the Board has had an opportunity to hear evidence and argument from the parties with respect to whether or not the applicant has qualified under Section 9(2) of The Labour Relations Act. A condition precedent to the granting of a prehearing representation vote requires the Board to make a determination with respect to the voting constituency; the respondents submit that the appropriate constituency is comprised of the employees of the three respondents. The trade union on the other hand maintains that the constituency is comprised of only two of the respondents.

It is submitted therefore that the Board must convene a hearing both with respect to the voting constituency and the level of membership support at the three respondents. Sealing of the ballot boxes in the circumstances is not sufficient in that there is a question as to whether or not the union has sufficient support to allow the employees a vote in the first instance.

8. Section 9 of the *Labour Relations Act* reads as follows:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

9. In *Savette Family Department Store Ltd.*, [1974] OLRB Rep. May 327, the applicant requested a pre-hearing vote with respect to a unit of employees of the respondent which included persons working in the drug store section of the respondent's premises. It appears that the applicant had, in another application then before the Board, taken the position that such persons were not employees of the respondent but, rather, were employees of G. Tamblyn Limited. The respondent objected to what it characterized as the applicant's mutually conflicting positions on the employment status of those persons, and took the legal position that:

all of the arrangements concerning a vote, including the question of the ballot which identifies and sets out the name of the employer, requires [sic] the acceptance or prior determination of the correct employer as an integral condition the vote."

The respondent took the position that the pre-hearing representation vote requested by the applicant should be postponed until the employment status of the drug department employees had been determined in the other proceedings in which that matter had been raised. The Board then considered its discretion under section 9, then section 8, of the *Labour Relations Act*:

7. It would appear that the pre-requisites to the exercise of the Board's jurisdiction to order a pre-hearing representation vote as set out in Subsection 2 of Section 8 of the Act are essentially two-fold. Firstly, the Board determines a voting constituency and secondly, it must be satisfied upon an examination of the relevant records that the applicant has taken in membership not less than 35% of the employees encompassed in that voting constituency. There are no other qualifications for the Board exercising its discretion in this regard. Nevertheless, Subsection 3 of Section 8 of the Act does preserve the rights of the parties to present their evidence and make their submissions at a time subsequent to the taking of the vote in that the ballot box containing the ballots cast during the vote is sealed and the ballots are not counted pending a further order by the Board. Once the Board has had an opportunity to review the representations of the parties in this regard, it might very well conclude that the applicant does not in fact possess the necessary 35% membership in the voting constituency (or indeed for that matter — in the resultant bargaining unit found to be appropriate by the Board). Thus, it is not uncommon for the Board to subsequently dismiss such applications on this basis even though a representation vote has been held. Further, the practice adopted by the Board in this respect is in complete accord with the provisions of Subsection 2 of Section 8 of the Act, which

does not require that the Board be “satisfied” (as is the case in the “ordinary” vote situation pursuant to Section 7(2) of the Act) with respect to the applicant’s membership position. The only requirement imposed in this regard is that it merely “appears” as such to the Board. It is this statutory language which permits the Board to order an immediate vote upon such limited evidence and thus obtain the views of the employees as disclosed through a representation vote conducted with a minimum of delay, leaving other contested issues to be determined at a later date.

On the basis of this analysis, the Board rejected the respondent’s position and directed a pre-hearing representation vote. The Board has consistently taken the position that a pre-hearing representation vote should not await formal adjudication of any aspect of the description or composition of the bargaining unit in the guise of a preliminary issue. As the Board observed in *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989:

7. The purpose of the pre-hearing vote procedure is to test the question of representation as quickly as possible after the application date. This avoids the prejudice which inevitably occurs when the conduct of a representation vote must await the determination of factual and legal issues which can only be resolved after a hearing in which each of the affected parties can participate. Often those disputed issues include the appropriate description of the bargaining unit, voter eligibility and employee status of challenged individuals. If the existence of such disputes could stand in the way of a pre-hearing vote, the procedure’s efficacy would be destroyed. That is why the Legislature required only that the Board strike a voting constituency and prescribed as the vote prerequisite only that the applicant have the appearance of the requisite support within the voting constituency. (See generally *Emery Industries Limited*, [1980] OLRB Rep. March 316 at paragraphs 5, 6 and 7). Where determination of the actual prerequisite level of support depends on a resolution of contested factual or legal issues, the Board assesses the appearance of support on the assumption that the union’s position on the matters in dispute is correct. A pre-hearing vote is normally directed if, on that assumption, the requisite appearance of support is present. The contested issues are dealt with after the vote is held. However, the results of a pre-hearing vote are of no effect unless it is later demonstrated that not less than 35 per cent of the persons ultimately found to have been employees in the appropriate bargaining unit on the application date were members of the applicant on that date. If that demonstration depends on contested issues being later resolved in the applicant’s favour, the Board will normally defer counting any ballots until it can resolve those issues which bear on the propriety of counting all, or any, of the ballots.

See also *Hydro-Electric Power Commission of Ontario*, [1968] OLRB Rep. July 376; *The Ontario Educational Communications Authority*, [1974] OLRB Rep. Dec. 886; *Emery Industries Limited*, [1980] OLRB Rep. March 316 and *Central Hospital* [1982] OLRB Rep. March 347.

10. While it is necessary for the Board to know the parties’ positions on relevant issues before it can make the determinations contemplated by subsection 9(2) of the Act, it is not necessary for the Board to resolve their differences on those issues before making those

determinations. Because the Board need only identify and delineate the conflicts rather than resolve them, it is only the most unusual case in which the officer's report on his meeting with the parties will be an insufficient basis on which to make the determinations called for by subsection 9(2). Although it is not in this case, it may occasionally be necessary for the panel to consult directly with the parties, rather than receive their positions through the officer or in writing; there should never be a necessity for a formal pre-vote evidentiary hearing in a pre-hearing vote proceeding. There may well be cases in which the issues of fact and law raised by the parties are so complex that some or all of them must be resolved before there can be any potentially beneficial resort to a representation vote. The appropriate response in such cases is to decline to exercise the discretion to order a pre-hearing representation vote and, instead, direct that the application be processed in the ordinary manner: see *Howard Furnace Limited*, [1961] OLRB Rep. July 98. We do not feel that the issues raised in this case require that response.

11. In considering this application, we must first determine a voting constituency, then ascertain whether there is an appearance of the requisite membership support within that constituency as of the application date. Because of the use to which pre-hearing representation votes are ultimately put, determination of the voting constituency is sensitive to the matters in dispute between the parties as they relate to the description of the appropriate bargaining unit. However, the limits of the voting constituency are not necessarily determined by the extremes of the positions taken by the parties, as the respondent seems to assume in taking the positions it does. The applicant is seeking to represent employees who work at 8 Oak Street in Weston, Ontario. In support of its application, it has filed membership evidence with respect to persons employed at that address. The respondent's contention is that the employer(s) of those employees and the employer of employees at 50 Penn Drive should be treated as being a single employer for the purposes of the *Labour Relations Act*. From the respondents' perspective, they are in the same position as a single employer with employees employed at two different municipal addresses within the same municipality, and the applicant is in the position of having applied for certification with respect to employees of that employer at only one of those two locations. To continue the analogy, the main issue then becomes whether the employees at that single location constitute a unit of employees appropriate for collective bargaining. If an applicant trade union in that position requested a pre-hearing representation vote of employees at the single location and resisted inclusion in the voting constituency of employees at the employer's other location or locations, we would not be obliged to define the voting constituency so as to include employees at those other locations.

12. We can see no reason to define the voting constituency so as to include employees of Finished Woodfloor Ltd. If the Board ultimately determines that those employees are included in the unit of employees appropriate for collective bargaining, it does not appear that the applicant would then be able to demonstrate, on the basis of the membership evidence filed with this application, that not less than thirty-five per cent of the employees in that bargaining unit were its members at the time this application was made. It does, however, appear to the Board on an examination of the records of the applicant and the records of the respondents that not less than thirty-five per cent of the employees of the respondents in the voting constituency hereinafter described were members of the applicant at the time the application was made.

13. The Board therefore directs that a pre-hearing representation vote be taken of the employees of the respondents in the following voting constituency:

All employees of Satin Finish Hardwood Flooring (Ontario) Limited and Satin Finish Hardwood Flooring Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and accounting staff.

14. All employees of the respondents in the voting constituency on October 25, 1984, who have not voluntarily terminated their employment or who have not been discharged for cause between October 25, 1984, and the date the vote is taken will be eligible to vote.

15. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with their employer.

16. In view of the dispute between the parties with respect to the description of the appropriate bargaining unit(s), if any, of employees at 8 Oak Street, the Board directs that separate ballot boxes be used in taking the representation vote, with ballots cast by employees of Satin Finish Hardwood Flooring (Ontario) Limited being placed in one ballot box and the ballots cast by employees of Satin Finish Hardwood Flooring Limited being placed in another. Both ballot boxes shall be sealed on completion of the vote, and remain so until the parties have had a full opportunity to present their evidence and make their submissions to the Board with respect to the appropriate bargaining unit(s) and the applicant's claim for certification pursuant to section 8 of the *Labour Relations Act*.

17. The matter is referred to the Registrar.

0314-84-U Sandra Hall, Complainant, v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Local 1421 and **Smith & Stone (1982) Inc.**, Respondents

Duty of Fair Representation — Unfair Labour Practice — Union representative handling grievance concentrating on proving grievor not probationary — Unaware of case law permitting probationary employees to grieve — Whether quality of representation amounting to arbitrariness

BEFORE: Paula Knopf, Vice-Chairman.

APPEARANCES: *C. A. M. Hillmer, Sandra M. Hall and Adele Worland for the complainant; L. A. MacLean and Frank Kenny for the respondent union; Heather J. Laing and Larry Sylvester for the respondent company.*

DECISION OF THE BOARD; November 20, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging that the complainant, Sandra Hall, has been dealt with by the respondent trade union in a manner which is in violation of section 68 of the Act. Section 68 states:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

Specifically, the complainant alleges that the union's conduct in this case amounts to arbitrariness because of its International Representative's alleged failure to properly assess, determine and/or appreciate the law applicable to the complainant's case and thus adequately or properly proceed with her case at the third step grievance meeting or at the arbitration hearing. Thus, the complaint involves a question of the quality of representation accorded the complainant by the trade union.

2. The Board heard three days of evidence on this case. Given the relatively narrow grounds of complaint in this case, much of the factual background to the matter is not strictly relevant to the ultimate issues. However, this background is important to put the complaint in its proper perspective. The complainant was hired by the respondent company on May 9, 1983. At the outset of her employment, she knew she would be on probation for 50 working days before she would be considered to be a regular or permanent employee. On August 9, 1983, the company obtained the union's consent to extend Mrs. Hall's probationary period by ten days. It is clear that the complainant was never notified of this extension at that time by either the union or the company. At all material times, both the company and the union have taken the position that it was the other's responsibility to notify Mrs. Hall of the extension of her probationary arrangement. In any event, on August 22, 1983, before the "extended probation" had expired, the company discharged the complainant. The stated reason for the discharge was "unsatisfactory work performance". Again, at all material times, the company's position has been that the complainant was a probationary employee at the time of her discharge.

3. Upon being discharged, the complainant almost immediately solicited the help of the union. She signed a grievance form protesting the discharge. The President of the union did not file that grievance with the company because he believed that Mrs. Hall was a probationary employee at the time of the discharge and as such not entitled to grieve her dismissal under their collective agreement. But when this fact came to the attention of Frank Kenny, the union's International Representative, he instructed the local union to immediately refile the complainant's grievance as well as a policy grievance to protest the discharge. These latter two grievances were processed together through the three stages of the grievance procedures under the collective agreement. While they were being processed, the union's plant committee and Mr. Kenny were investigating the complainant's case by checking her employment records with those of the company in an effort to determine whether she was in fact a probationary employee or a permanent employee at the time of her discharge. The reason this question arose was because of confusion over the calculation of part days worked and whether they would apply towards the fulfillment of the probationary period. In any event, it is clear from the evidence and readily conceded by the complainant that the union and Mr. Kenny did a thorough and responsible job in investigating her probationary status. Further, the complainant took the position that any errors made by the union regarding the filing of the grievance initially or the handling of the extension of the probation were cured by bringing the case to arbitration.

4. Eventually, a "third step" meeting under the collective agreement was held with management in an attempt to resolve the matter. Mr. Kenny was present at that meeting with the union committee as well as management. Both the merits of the alleged cause for discharge and the issue of probationary status were discussed by the parties. It was Mr. Kenny's impression that the company was fundamentally resting its case on its unfettered right to discharge Mrs. Hall because of her probationary status. The company's formal third step response also referred to the complainant's failure to obtain seniority at the time of her termination. No settlement was achieved at that meeting. After approval of the union's membership was obtained, the union proceeded to refer the case to arbitration.

5. In preparation for the arbitration, Mr. Kenny and the union committee met on several occasions with the complainant at her home. Each meeting lasted at least one to one and a half hours. Mrs. Hall and Mr. Kenny both recalled discussing the facts surrounding the number of days she had worked as well as her actual work performance records. Thus the merits of the discharge as well as the probationary status issues were explored with Mrs. Hall as well as other potential union witnesses. Mr. Kenny prepared statements for each witness that he intended to call at the arbitration. Two of these statements were filed before this Board including that of Mrs. Hall. Both concentrate on the facts surrounding the extension of the probationary period and the termination. Neither deal with the merits of the case regarding job performance.

6. Prior to the arbitration hearing, Mr. Kenny asked the complainant if she wanted him to try once more to reach a settlement for her. His uncontradicted evidence was that he advised her that he believed she had a weak case at arbitration because he had concluded that she would be considered to be a probationary employee unless he could convince an arbitrator that the extension of the probation was invalid. Despite this, Mr. Kenny says that the complainant advised him not to pursue settlement attempts but instead to proceed through to arbitration.

7. The case came to hearing before Professor Brandt, sitting as a sole arbitrator, on March 1, 1984. Mr. Kenny represented the complainant. Mr. Kenney testified that he was prepared to argue the merits of the case on job performance as well as the fact that the complainant should be considered to be a permanent employee because she had never received

notice of the extension of the probationary period. Mr. Kenny described this latter argument as “grasping at straws” but he felt that that was all that was available to the complainant. After opening statements were made by the company’s representative and Mr. Kenny, the arbitrator invited the representatives to recess to see if the issues in the case could be narrowed. After this recess, the parties came to the mutual agreement that was summarized by Professor Brandt in his award on page 3 as follows:

... The parties agreed that the success or failure of the Grievance was to turn *entirely* on the issue as to whether or not the company was obliged to notify the grievor of an agreed upon extension to her probationary period and whether or not, assuming such an obligation to exist, the failure of the company to discharge it had the effect of rendering the agreement to extend her probationary period null and void thereby resulting in her having worked at the probationary period established under the collective agreement.

(emphasis added)

Therefore, because of the agreement reached by the parties at the arbitration, the parties did not call any evidence on the merits of the discharge itself. If the extension of the probation had been ruled to be invalid because of the company’s failure to notify the complainant, the parties understood that the complainant would have been reinstated. If the arbitrator were to hold that it was the union’s responsibility to notify the complainant, then the parties understood that the discharge would have been upheld.

8. After hearing witnesses for both parties, Professor Brandt released a decision dated March 8, 1984 reaching the following conclusions:

I conclude therefore that there was no consent from Mrs. Hall to a ten working day extension of her probationary period.

Given that conclusion the question which must now be addressed is whether or not it was the union or the company which had the obligation to obtain that consent. I have no difficulty in concluding that this obligation rests upon the union. ... Thus the situation is that the union and the company have reached what is in essence an illegal agreement changing the conditions of employment of an employee. It is illegal because it did not have the consent of the employee and, insofar as it was the union’s obligation to obtain that consent, it is the failure of the union in that regard which has caused this agreement to be illegal. In these circumstances, the union should now be estopped from claiming that the agreement is illegal and insisting that the grievor’s rights be determined by reference to article 17.02 of the collective agreement. ... [As] a matter of law, the union was mistaken in its assessment of its own duties and responsibilities in connection with one of its members and the responsibility for the prejudicial result which Mrs. Hall has suffered must lay with the union.

Given the issue as framed by the parties, the grievance was therefore dismissed.

9. It is clear that Professor Brandt was never asked by either party to consider the question of whether or not the arbitration board had jurisdiction to consider the merits of the

discharge regarding job performance even if it was concluded that Mrs. Hall was still a probationary employee. Professor Brandt notes on page 7 of his award:

In view of the agreement by the parties to narrow the issue to this one point no evidence was led or argument advanced with respect to the question as to whether or not, notwithstanding the fact that the grievor was a probationary employee, the decision of the company was still subject to arbitral review by reference to a standard somewhat lower than that which would apply in respect of seniority employees.

Further, Mr. Kenny admits that his view of the collective agreement was that probationary employees had no right to grieve a discharge or have it arbitrated. Further, his research into the case did not reveal to him the possibility of making such an argument. It is clear that he simply was unaware of the concept that a probationary employee may have had a right to grieve under this collective agreement.

10. It is solely this unawareness and failure to raise the argument that a probationary employee can grieve on the merits of the discharge at the third step grievance meeting or at the arbitration that the complainant alleges amounts to the arbitrary conduct of Mr. Kenny and the union in this case. Counsel for the complainant referred to the emerging body of case law flowing from the Divisional Court's decision in *Toronto Hydro-Electric System and Canadian Union of Public Employees, Local 1* (1981) 29 O.R. (2d) 18; leave to appeal to the Court of Appeal denied, (1981) 30 O.R. (2d) 64. Examples of cases flowing from that decision that were cited were: *Falconbridge Nickel Mines*, (1982) 1 L.A.C. (3d) 158 (P. C. Picher); *Falconbridge Nickel Mines*, (1982) 4 L.A.C. (3d) 149 (P. C. Picher). Essentially, these cases establish that where a collective agreement gives all employees a substantive right and then purports to deny some employees (i.e. probationary employees) access to the grievance and arbitration procedures for the enforcement of that right, then that purported denial is void by virtue of section 37 of the *Labour Relations Act*. Applying those principles to the facts of this case, counsel for the complainant argued that this collective agreement created a substantive right for all employees to grieve discharges. While another part of the collective agreement may appear to limit the right to grieve only to employees who have passed through the probationary period, it was argued that such a limitation is void because of section 44 of the *Labour Relations Act*. Thus, even if Mrs. Hall were a probationary employee, it was submitted on her behalf that she should have been able to have the merits of her discharge heard by the arbitrator. The union's failure to address this was submitted to be evidence of arbitrary conduct.

11. The relevant provisions of the collective agreement are as follows:

ARTICLE 4

MANAGEMENT FUNCTIONS

The Union acknowledges that it is the right of the Company to:

4.03 Suspend, discipline or discharge, for just cause, any employee, subject to the right of the employee to submit a grievance.

ARTICLE 12

GRIEVANCE PROCEDURE

12.02 An employee having complied with the provisions of Article 12.01, and who believes that the complaint has not been adjusted satisfactorily may lodge a written grievance. The employee shall be entitled to have the assistance of his Zone Committeeman in preparing such grievance on forms supplied by the Company. Such forms will be completed and signed by the grieving employee.

The Zone Committeeman shall take it up with the employee's immediate Foreman who shall give an answer in writing within two (2) working days of the presentation of the grievance. It shall be optional to the Company to decline to consider any grievance, the alleged circumstances of which occurred more than five (5) working days prior to its presentation except in the case of a grievance claiming failure on the part of the Company to give the required notice of recall in which instance, the period of time shall be thirty (30) working days. Probationary employees are entitled to lodge a grievance in the same manner, and to the same extent as regular employees, except with respect to their separation from employment.

12.07 An employee with seniority, who is discharged, may present a grievance in writing through the Plant Committee to Management within three (3) working days of discharge and Management will review the grievance with the Committee and render a decision within three (3) working days after such review. If the decision of Management is not acceptable to the aggrieved, the grievance may be appealed to arbitration as herein provided.

ARTICLE 17

SENIORITY

17.01 Fundamentally, rules respecting seniority are designed to provide employees an equitable measure of security based on length of continuous service with the company.

17.02 An employee shall acquire seniority rights when he has worked a total of fifty (50) working days within any period of twelve (12) consecutive months.

An employee who has worked a total of fifty (50) working days within any period of twelve (12) consecutive months will be given a seniority date which will be his date of hire.

17.03 An employee shall be a probationary employee until he has acquired seniority rights at which time he shall become a regular employee. The retention of probationary employees shall be solely at the discretion of the Company.

Section 44(2) of the *Labour Relations Act* provides in part:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the first party's appointee to an arbitration board. . . .

12. Counsel for the complainant argued that Mr. Kenny's and the union's misconception of the rights of probationary employees under the collective agreement made them unaware of the arguments available to Mrs. Hall and thus their representation of her amounts to such a fundamental oversight as to be considered arbitrary. Much reliance was placed on this Board's decision in *Phillip Wayne Bradley*, [1983] OLRB Rep. March 323. At the same time, Mrs. Hall and her counsel conceded that, so far as it went, the union's representation of her before and during the arbitration hearing was thorough and worthy of compliment. However, their complaint is that the representation just did not go far enough because of Mr. Kenny's admitted lack of knowledge of the case law flowing from the *Toronto Hydro-Electric System* decision.

13. The union replied to this complaint by first calling it frivolous and vexatious. But essentially it was argued that the union did actually go beyond its basic duty of representation to the complainant by even taking this case to arbitration and by doing such a thorough and professional job in trying to settle the case and then preparing for the arbitration. It was submitted that the Board is being asked to second guess Mr. Kenny's judgment of how to proceed with the case and that this Board ought to refuse to do that. Further, whether Mr. Kenny's characterization of the issues of the case were correct or not, it was submitted that he arrived at these characterizations after a careful and reasoned analysis of the facts and the law and that this ought not to be considered to be conduct which falls within the scope of section 68 of the Act. Alternatively, counsel for the union argued that even if Mr. Kenny was wrong in concluding that Mrs. Hall had no right to grieve her discharge on the merits if she was a probationary employee, his interpretation was at least reasonable given the decisions such as *The Queen in Right of New Brunswick and Leeming*, (1981) 118 D.L.R. (3d) 202 S.C.C. and *Board of Governors of the Riverdale Hospital and Canadian Union of Public Employees*, (1983) 11 L.A.C. (3d) 267 (Brandt). Those were cases where the collective agreements differed from those in the *Falconbridge* cases cited above in that the collective agreements did not confer upon probationary employees the substantive just cause provisions in the first place and thus they could never avail themselves of the grievance procedures in their collective agreements for discharge. It was therefore argued that it was reasonable to say that no substantive right was given to probationary employees in this collective agreement to grieve discharges because article 4.03 contains within the substantive management rights clause a limitation excluding probationary employees from the grievance procedure by virtue of article 12.07. In any event, the union referred the Board to the following cases in support of the position that the union's conduct does not fall within section 68 of the Act: *Walter Prinesdomu*, [1975] OLRB Rep. May 444, *Conestoga College*, [1983] OLRB Rep. June 882; *Ruby Chow*, (1981) 3 Can. LRBR 43; *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417. Counsel for the respondent company adopted the arguments and the position of the union.

14. It is important to emphasize that the complaint before this Board is solely that the union acted in an arbitrary manner towards the complainant. There was no allegation or suggestion that the union's conduct demonstrated bad faith or discrimination. Therefore, the

Board must determine whether the union's conduct falls within the standard of arbitrariness as contemplated by section 68 of the Act. That standard has been established in the *Ford Motor Company of Canada Ltd.* case, [1973] OLRB Rep. Oct. 519:

40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance with that community.

15. The reason for this standard was explained in the the case of *Walter Prinesdomu*, *supra*:

27. There is thus a concern not to engage in what may well constitute uninformed second guessing about a process of decision-making that resides at the heart of the administration of the collective agreement or to impose unrealistic standards of conduct upon unpaid union officials who may lack the experience and time required to shoulder the burden. The parties to a collective agreement are the most familiar with the problems that must inevitably arise and decisions have to be made "in a context of considerable conflict with delicate balances of mutual acceptability in a vortex of power, reason and persuasion". (See Hanslowe, *Individual Rights in Collective Labour Relations* (1959) 45 Cornell L. Rev. 25, 46.) It is argued that a more stringent definition of the duty would discourage the union from settling grievances thereby clogging the lifeline of the collective agreement. Further, because, in appropriate circumstances, an employer can be directed to respond to an alleged violation of the collective agreement which it may consider settled or withdrawn (and possible time barred) too stringent a standard might introduce an unhealthy uncertainty that would discourage or penalize reasonable reliance on a trade union's actions. In other words, it is felt that a more stringent standard would adversely affect the entire relationship between trade unions and employers to the detriment of all employees. Unfortunately, this limitation — one prevailing in the United States as well as in Ontario — necessarily leaves employees affected by mistakes and carelessness without a remedy under the section 60. . . .

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. According-

ly at least flagrant errors in processing grievances — errors consistent with a “not caring” attitude — must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.

16. Thus, the Board has made it clear that mistake, negligence or errors in judgment do not of themselves amount to a breach of section 68 for arbitrariness. To fall within section 68, conduct must be such that the errors committed are so flagrant as to demonstrate a non-caring attitude or so summary as to be reckless, capricious or grossly negligent. See also *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001; *Seagram Corporation Ltd.*, [1982] OLRB Rep. Oct. 1571; *Cryovac, Division of W.R. Grace and Co. Ltd.*, [1983] OLRB Rep. June 886; and *North York General Hospital*, [1982] OLRB Rep. Aug. 1190.

17. In applying these principles, it should also be kept in mind that this case is one of the utmost importance to the complainant because it involves her discharge and thus her livelihood. This is so despite her short period of employment with the respondent company. In addition, the conduct of Mr. Kenny can and must be assessed in the perspective of the fact that he is a full-time international representative of a large and sophisticated union. He has held this position since 1969. He is responsible at this time for the administration and negotiation of 25 collective agreements. He has handled hundreds of grievances and approximately 25 to 30 arbitration hearings. Thus, his experience demands a high standard of representation for purposes of satisfying section 68, especially given the importance of this case to the complainant.

18. The evidence makes it clear that Mr. Kenny simply had no awareness of the jurisdictional argument that may have been available to the complainant regarding her possible right to grieve the merits of her discharge. Although Mr. Kenny did some legal research in the preparation of the case, the material he consulted did not reveal to him this possible argument. However, on the basis of the interpretation he developed of the collective agreement without knowledge of those cases, and having regard to the materials he did consult, Mr. Kenny came to a decision that the complainant's best chance of success before an arbitrator would be to try to establish that she was not in fact a probationary employee because the attempt to extend her probation had been voided for lack of notice by the company. That was the *main* strategy he intended to pursue at the arbitration. When the parties seized upon the arbitrator's suggestion to narrow the issues at the arbitration hearing, that became the only issue that needed to be pursued before the arbitrator. The fact that the grievance did not succeed is not proof of any deficiency in Mr. Kenny's representation. Instead, it is a result of the arbitrator arriving at a decision based on the facts that were established before him and the legal principles that he applied to those facts. Further, the fact that another legal argument or approach may have been available to the complainant does not establish a defect in the union's representation of the complainant. Certainly, Mr. Kenny's position before this Board would have been stronger if he had considered the jurisdictional argument and consciously rejected it as an inferior

strategy. Had he done so, absolutely no fault could have been found in his approach. However, the fact that he did not do so does not amount to evidence of a “non-caring attitude” or a “summary approach” that can be considered to be “reckless, capricious or grossly negligent”. The mere fact that he was not aware of such an argument or did not discover such an argument does not amount to arbitrariness. We reach this conclusion because on the basis of the facts and the information available to Mr. Kenny and which Mr. Kenny was aware of, he considered Mrs. Hall’s case carefully and put his mind to the case and made a reasonable decision as to how to best present the case to the arbitrator. He also did this in a manner which is completely consistent with the experience and level that this Board would exact from a union official in his capacity. To decide otherwise, would be to essentially second guess Mr. Kenny in retrospect with the calmness that time affords and with the advantage of having the insight into Professor Brandt’s conclusions.

19. Having said that, and recognizing the complete propriety of this Board’s reluctance to second guess such decisions, this Board is still compelled to comment that it feels that the strategy adopted at the arbitration for the complainant ended up being potentially more advantageous to her than had she put her case to the arbitrator on the merits. Given the extremely low standard of just cause that arbitrators apply to short-term or probationary employees and given article 17.03 of this collective agreement, it is virtually impossible to see how the complainant could have hoped to succeed on the merits of the case if she had persuaded the arbitrator to address them. Thus, the approach taken by Mr. Kenny at the arbitration may well have been the best strategy to have pursued. However, it must be emphasized that this paragraph is mere speculation and is *obiter dicta*.

20. Comment should also be made on the *Bradley* case’s applicability to this fact situation. With great respect to counsel for the complainant, that case is quite distinguishable from Mrs. Hall’s case. In *Bradley*, the union clearly failed to represent or even consider representing Mr. Bradley because of his probationary status. It further failed to advise him of his individual rights to pursue a remedy. Thus, the facts established a clear breach of section 68. Further, the Board found in paragraph 25 of the *Bradley* decision:

One of the most fundamental ways in which a trade union represents bargaining unit members is through negotiation of a grievance procedure and through the participation of its officials in some or all of the steps in the grievance procedure. The respondent in this case negotiated a grievance procedure accessible to all bargaining unit employees and did not negotiate a clause excluding probationary employees from the substantive right of having their discharge or suspensions subject to the standards set out in the MIH rules. But in the same collective agreement the respondent stipulated, through section 4(b) that it would not represent probationary employees who have been discharged. This stipulation, in the context of this collective agreement, is an arbitrary one because it sanctions an unresponsiveness and the total ignoring of the merits of a probationary employee’s discharge simply because he or she is probationary.

The arbitrariness in the *Bradley* case stemmed from the union’s failure to respond in any way to the probationary employee’s request for representation even though probationary employees were not excluded from having their grievances processed. Further, the collective agreement itself purported to allow the union to be unresponsive without any explanation as to why probationary employees should not be represented by the union. This meant that both the

collective agreement and the fact situation in the *Bradley* case amounted to arbitrariness because of the union's abdication of its duty to Mr. Bradley. That situation is quite distinguishable from the one facing Mrs. Hall and this union. The only similarity in the cases is the allegation that the union's conduct arose because of an error or misconstruction of their collective agreements. But as set out above, an error in itself does not establish arbitrariness. Nor was it the error in understanding the collective agreement alone that amounted to the arbitrariness in *Bradley*. Further, without deciding whether Mr. Kenny's interpretation of the probationary's rights under the collective agreement was right or wrong, we are prepared to conclude that his interpretation was legitimate and reasoned, and may even consider it to be "reasonable". But in no way can this union be considered to have abdicated its responsibilities to Mrs. Hall as was done in the *Bradley* case.

21. Therefore, while this Board need not nor should not decide whether it would have conducted Mrs. Hall's case in the way it was conducted by Mr. Kenny, the evidence establishes good and sufficient reasons for him to have conducted himself as he did. Thus, we conclude that the respondent union has not conducted itself in a manner that is arbitrary or in any way violates section 68 in its responsibility to Mrs. Hall. For the foregoing reasons, the complaint is dismissed.

22. Both the complainant and the respondent ask for costs in this case. Suffice it to say that this is not an appropriate case for costs to be awarded having regard to the principles of this Board with respect to costs as set out in the decision of *Radio Shack*, [1979] OLRB Rep. Dec. 1220.

1741-84-R United Steelworkers of America, Applicant, v. Sonco Steel Tube Limited, Respondent, v. Group of Employees, Objectors

Bargaining Unit — Practice and Procedure — Employer operating two plants — Existing agreement excluding quality control employees from production unit — Board finding separate production tag-end unit and office unit appropriate

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and P. J. O’Keeffe.

APPEARANCES: *Brian Shell and M. Sheppard for the applicant; Peter Thorup, Frank L. Aguanno, David F. Thomas and Ted Parker for the respondent; Steve Cook and Peter Wartman for the objectors.*

DECISION OF THE BOARD; November 26, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. There is presently a collective agreement in effect between the parties covering the 40 or so production employees of the respondent at its Van Kirk Drive plant. The parties also have a collective agreement covering the production employees at the respondent’s larger plant on Holtby Avenue. The applicant brings the present application to cover all of the remaining employees at the Van Kirk Drive plant. These employees include 12 persons employed in the quality control laboratory, and 4 persons employed in the office. The quality control employees form part of a regular production crew, and rotate on shift with their crew, and the Board has no doubt whatever that the community of interest of these quality control employees lies with the plant, rather than with the office. The applicant points out, however, that the parties themselves, for whatever reason, negotiated a compromise in their voluntary recognition agreement for the plant that excluded quality control employees from the scope of that agreement. The scope clause of that agreement reads:

The Company recognizes the Union as the sole collective bargaining agent for all employees of the Company, at its plant at 95 Van Kirk Drive, Brampton, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and quality control personnel. This Collective Agreement shall not apply to the Holtby Avenue plant.

The applicant has organized in both the laboratory and the office at this location, and indicates that it is prepared to have the Board treat the present application as two separate applications if necessary, but submits that with the numbers in question, the appropriate bargaining unit at this time would be effectively one “tag-end” unit comprised of both the laboratory and office employees, irrespective of where the “community of interest” of the laboratory employees themselves may lie.

4. The respondent, on the other hand, proposes a bargaining unit which is confined in its effect to the laboratory employees only, being:

All employees of the respondent employed at 95 Van Kirk Drive in the City of Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

This description, because of the exclusion of "office staff", is a "tag-end" to the production unit only. The respondent argues that no community of interest whatever exists between the office staff and the quality control employees who remain outside of the production unit and that in fact the real community of interest of this unit of office employees is with the main group of office employees located at Holtby Avenue. The office employees at Van Kirk Drive perform the identical job functions to those located at Holtby Avenue, and the persons to whom they report are located in the Holtby Avenue office. One employee, in fact, spends 75% of her time in the Van Kirk office performing the function of a Bill of Ladings clerk, while the remaining 25% of her time is spent relieving on the switchboard at the Holtby Avenue location. The two plants are located within a 5-minute drive of each other. Some of the present assignment of office employees to the Van Kirk location is no more than the result of lack of space at the Holtby Avenue office, and the respondent is currently contemplating a plan to build additional office space at the Holtby Avenue plant.

5. Normally the Board will recognize on a virtually automatic basis the appropriateness of at least one pure "production" and one pure "office" unit at a particular location. Beyond that, the Board will usually look to a "tag-end" to encompass any remaining employees who have somehow come to lie outside the scope of the existing units. The notion of a "tag-end" unit, as the applicant points out, is not based upon community of interest at all; rather, it is a recognition by the Board that a point has been reached where community of interest considerations must give way to considerations of an undue proliferation of bargaining units at the workplace.

6. The applicant is not, however, asking the Board to follow its normal practice in the present case. Rather, the applicant is asking the Board to depart from its normal practice of recognizing at least one pure production and one pure office unit, and to revert to a "tag-end" unit as the next step following the creation of the primary production unit. Were the Van Kirk Drive plant standing on its own, the Board might find insufficient countervailing factors to cause it to reject the unusual request of the applicant here, such request being based solely on a practical appraisal of the numbers involved. The Van Kirk Drive office is, however, clearly interconnected with the operation of the respondent at Holtby Avenue, and, given that interconnection, it is the view of the Board that it ought to be circumspect in treating the one plant differently than it would the other, solely on the basis of the present numbers at the Van Kirk Drive location. This is particularly so when it is apparent that the numbers in the office group itself are in a state of flux dependent upon the space available from time to time at each of the two locations. On balance, the Board is not persuaded that the present circumstances call for a departure from the normal establishment of at least two primary units strictly along community of interest lines, and the Board finds the description of the bargaining unit put forward by the respondent to be the appropriate one in this case. Any additional classifications accruing to this location will accordingly fall into either an office unit or this "tag-end" to the production unit.

7. The Board accordingly finds that all employees of the respondent employed at 95 Van Kirk Drive in the City of Brampton, Ontario, save and except foremen, persons above

the rank of foreman, office and sales staff, persons covered by a subsisting collective agreement, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).

8. Based on the material before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made were members of the applicant on October 16, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. There was, in addition, a statement in opposition to the application filed by two members of the quality control staff; but even if the Board were to give that statement full weight, it would not reduce the applicant's level of unqualified membership support below the 55 per cent required for certification without a vote.

10. The Board accordingly certifies the applicant as exclusive bargaining agent for the employees of the respondent in bargaining unit #1.

11. The Board further finds all office employees of the respondent at 95 Van Kirk Drive in the City of Brampton, Ontario, save and except supervisor, and persons above the rank of supervisor, to be a unit appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).

12. Based on the material before it, the Board is satisfied that not less than forty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made were members of the applicant on October 16, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. The Board accordingly directs that a representation vote be held amongst the employees in bargaining unit #2. All employees in bargaining unit #2 as of the date hereof, who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

15. The matter is referred to the Registrar.

1465-84-M;1529-84-U International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant/Complainant, v. **Standard Insulation Ltd.**, Respondent

Construction Industry Grievance — Unfair Labour Practice — Witness — Subpoenaed respondent failing to appear — Board proceeding ex-parte — Persistent delinquency in remittance of contributions — Breach of collective agreement as well as of s.50 — Remedy including legal expenses and expenses for collection efforts as stipulated in agreement

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members A. Grant and L. C. Collins.

***APPEARANCES:** Mark Zigler and J. DeWit for the applicant; no one appearing for the respondent.*

DECISION OF THE BOARD; November 15, 1984

1. These are a referral of grievance under section 124 of the Act and a complaint filed under section 89 of the Act alleging contraventions of sections 50, 51 and 147(2). Both matters are rooted in the same set of circumstances and the remedial relief sought is identical. The Board hereby consolidates the two files for hearing.

2. It is noted that no one appeared for or on behalf of the respondent in either matter, and that Freddie L. Pilgrim, an official of the respondent was served on a timely basis with a subpoena duces tecum and failed to respond, howbeit a phone message was received in the Board's offices on the morning of September 20th, 1984, the day of hearing, stating that Pilgrim's truck had broken down the previous night and he would be unable to attend. Even if we were to accept the explanation given to the Board's offices, we view it as patently insufficient for us to excuse Pilgrim's failure to respond. The Board canvassed with counsel for the union as to whether the proceedings should be adjourned to permit the issuing and serving of a bench warrant to have Pilgrim brought before the Board and it was counsel's view that such evidence as could be adduced should be led and that the Board should issue a bench warrant returnable on some future date. The Board indicated that in its view the subpoena to appear on September 20th, 1984 and for continuing days might well be spent by the non-appearance of Pilgrim before the Board on that day, and would be ineffective to ensure attendance at a future date. It was the decision of counsel to proceed in the absence of Pilgrim. The Board now confirms that in Pilgrim not appearing on September 20th and his attendance not then enforced so that he was before the Board it made it impossible for the Board to bind him over to any continuation of hearing. The subpoena is affectively spent.

3. The parties were bound by a collective agreement running from January 12th, 1983 to April 30, 1984 and are bound by the renewal collective agreement which will continue in effect until April 30, 1986. Article 15 of the collective agreement sets forth contributions to be made by the employer in respect to each hour worked by an employee to be used for the purpose of "providing health, welfare and pension benefits" to eligible employees. The agreement also requires payment of contributions ear-marked for the Insulation Industry Development Fund and to the Joint Apprenticeship Committee. All contributions going into the Local 95 benefit fund are under the control of joint trustees representing the Master Insulators Association and the union. Article 15.02 requires the employer to report all hours worked (or to make a Master Insulators' report) and to forward a cheque with the report to the Administra-

tor of the Fund before the fifteenth day of the month following the month in which the hours are worked.

4. The current collective agreement provides for the treatment of delinquent employers in the following language,

- (i) The trustees may require a delinquent employer to pay for the costs, legal or otherwise, of collective the amount owing.
- (ii) Notwithstanding (i) above, there will be a surcharge of fifty dollars (\$50.00) or ten percent (10%) of the amount owing, whichever is the greater, for all payments not received by the Administrator of the Funds, (Murray G. Bulger Administrative Services Limited or successors) by the 22nd day of the month in which the payment is due. This surcharge applies only to any and all arrears of the monthly remittances, and applies only once to the remittance for each month.

The imposing of the surcharge the first time is at the discretion of the Trustees, thereafter it shall be automatically imposed.

5. Testimony was heard from Mrs. Katherine Rae who is employed by Murray Bulger & Associates as the Administrator of the Asbestos Workers Local 95 Benefit Fund and has acted in that capacity for twelve years. She testified that prior to 1982 they were experiencing a large number of delinquencies and it was a cause of concern inasmuch as the receipt of contributions jeopardized the insurance and other coverages of members. At that time the Benefit Fund was experiencing some fourteen delinquencies per month. In that negotiation of a renewal agreement a procedure to deal with delinquencies was introduced requiring the Administrator to notify a delinquent employer by registered mail and unless within 7 days later the Administrator was required to inform the trustees, the union and association and the trustees were authorized to take "whatever action is necessary against such employer to enforce payment". Following this amendment to the agreement the practice has been that if payments are not received by the 18th of the month a grievance is prepared by the Administrator, signed by an appropriate union representative and then mailed to the employer by the Administrator. If corrective action is not taken within 7 working days the Administrator prepares a referral under section 124 of the *Labour Relations Act* which is signed by the union representative and mailed by him to the Registrar. This change in the agreement and consequent procedure resulted in very substantially reducing the number of delinquencies each month.

6. Original records and a prepared summary establish that in the 43 month period from November 1980 to May 1984 the respondent has been delinquent in all but 3 months. Beyond that period the reports and remittances for the month of June 1984 due on July 15th, 1984 were not received until September 10, 1984; similarly the reports and remittances for the month of July 1984 due on August 15th, 1984 were received on September 10th. The report and remittance for the month of August 1984 had not been received as of the date of this hearing. The evidence was that this employer's record in respect to remittance delinquencies was unique amongst all employers covered by the collective agreement.

7. Mrs. Rae testified from her files that between March 18th, 1982 and May 29th, 1984 there have been 20 grievances filed against the respondent for failure to provide reports and

remittances on a timely basis. In 9 of those cases the respondent cured his violation by providing the report and the remittance: in 11 of these cases the grievance was referred to arbitration under section 124 of the Act and resulted in the employer bringing himself into compliance on the day before the matter was scheduled to come before the Board and in some instances on the day of such hearing. In no case was the matter heard by the Board or a Board order made.

8. Mr. Joe DeWit has been a Business Agent for Local 95 for some two years, and since January 1, 1984 has been a member of the Board of Trustees of the Asbestos Workers Local 95 Benefit Fund. Additionally since June 1st, 1984 he has been interim Business Manager of Local 95.

9. He testified that he had signed the grievances filed against the respondent. He also testified to having attended a meeting of Trustees on June 13th, 1984 at which he reported having received a monthly report directed by the respondent to him and the accompanying cheque was made payable to Local 95. A motion was approved by the Trustees that in respect to Standard Insulation as follows:

- The cheque for the work-month of April is to be returned by the Union office indicating that the Union cannot accept monthly remittance cheques on behalf of the Benefit Fund.
- A grievance is to be filed with a view to laying criminal charges.
- The Pension Commission of Ontario is to be contacted to determine whether or not a charge can be laid by them for late submission of pension contributions.

It is also noted in those minutes that the Administrator was to provide the union's solicitor with "details of late submissions or N.S.F. cheques made by Standard Insulation, back to December 1983" and to report the charges incurred with respect to this assignment. The trustees requested the union to file a special grievance against the respondent under Article 15 to recoup costs of collection etc. and to provide for remedial relief against future continued problems.

10. On August 13th, 1984 the union, through its solicitor, filed a grievance "re: violations of the Collective Agreement by Standard Insulation Ltd." in which it set forth the reasons for the grievance as follows:

- (i) From and after January 1, 1981 and continuing to date, the Employer has persistently been delinquent in forwarding monthly contribution reports and remittances for employee benefits required by the Collective Agreement and, more particularly, during the currency of the Collective Agreement, the Employer has persistently, on a monthly basis, refused to make remittances, as required by Article 15.02 of the Collective Agreement, on or before the 15th day of the month following the month in which such hours are worked. Such violations have occurred, notwithstanding numerous grievances filed and referrals to arbitration before the Ontario Labour Relations Board during the currency of the current Collective Agreement.

- (ii) In respect of the work month of May, 1984 and continuing to date, the Employer has failed to report the hours worked for each employee and has failed to pay the required contributions and deductions, as and when required by the Collective Agreement, to the Asbestos Workers' Local 95 Benefit Fund with respect to health, welfare and pension benefits, union dues, Insulation Industry Development Fund and Joint Apprenticeship Committee and to the Asbestos Workers' Local 95 Living Allowance Trust Fund, contrary to the Collective Agreement, and, without limiting the generality of the foregoing, contrary to Articles 15, 16 and 18 thereof.

At the time of filing this grievance the respondent had failed to submit reports or remittances for the month of June, 1984 and which should have been submitted by July 15th, 1984. The union acknowledges having subsequently received these on September 10, 1984 (the referral to arbitration and the section 89 complaint having been filed with the Board on September 7th, 1984). additionally, for the month of May, 1984 in accordance with the collective agreement the employer should have remitted \$420.88 to the fund but instead remitted only \$284.25, a difference of \$136.63.

11. It appears that the \$136.63 represents an amount claimed by the respondent for materials supplied by it sometime in 1983 to a school set up under the supervision of the Joint Apprenticeship Committee. DeWit who now administers the Apprentice Schools, but did not at the time of the transaction, testified that he had investigated the matter with some difficulty because of lack of records, but that he ultimately advised the respondent to forward an invoice and it would be paid. He testified no invoice has been received to date and that in any event there is no authority for the employer to make a withholding from contributions due in respect to it.

12. The evidence establishes that the respondent over a long period of time has persistently, repetitively and knowingly engaged in many violations of the collective agreement, all of which have been of the same type. It is an unquestioned conclusion that these violations arose not from any difference in opinion as to how the contract was to be interpreted and applied or by any inadvertence on the part of the respondent, but were motivated by the respondent's desire to harass the union by highly unreasonable and unfair conduct by intentionally refusing to fulfill his obligations which are clear and unambiguous in the contract. That the respondent on twenty out of twenty three occurrences complied with his contractual obligations only after forcing the union to take steps to cure the violation, speaks for itself as establishing a motive of harassment. While it is well-established that matters of dispute regarding collective agreement application and interpretation are the province of arbitral tribunals and not of the Ontario Labour Relations Board (save for the provisions of section 124 of the Act). The conduct with which we are faced here extends beyond that function and is challenging of the public policy declared by the Legislature in the Act. There is really no dispute by the respondent that he has an obligation to submit reports and remittances by the 15th day of each month but repetitively takes the position of forcing the union to take steps to enforce his obligation. In our view that is clearly conduct which is in contravention of section 50 of the Act which reads,

50. A collective agreement is, subject to and for the purposes of this Act, bringing upon the employer and upon the trade union that is a party to the

agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

Section 147(2) reads as follows:

147.-(2) A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.

It is also established that a breach of the above section may found a basis for the Labour Relations Board exercising its broad remedial powers pursuant to section 89 of the Act. See *Carrol Electric Ltd.*, [1983] OLRB Rep. Aug. 1282 and the cases cited therein of *J. G. Rivard Limited*, [1980] OLRB Rep. July 1009, *Eastern Sheet Metal & Mechanical Construction*, [1981 OLRB Rep. Jan. 26 and *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418. In the instant case we find the respondent has contravened section 50 of the Act in repetitively refusing to be bound by the obligations arising out of article 15 of the collective agreement. Inasmuch as the remedial relief available to the union within the terms of the collective agreement is in our view adequate we intend to deal with the matter within the context of the section 124 referral to arbitration.

13. At the time the referral to arbitration was made i.e. September 7th, 1984 there were outstanding reports and remittances for the months of June and July 1984. Subsequent to the referral the respondent made belated reports and remittances in respect to these two months. Also at the time of referral there was the amount of \$136.63 by which the June 15th, 1984 remittance for May 1984 remittance was short. It is our view that the union is entitled to receive \$136.63 together with interest thereon from June 15th, 1984 up to the date of this award, and that the union is similarly entitled to receive interest in respect to the remittances for the month of June between July 15th, 1984 and September 10th, 1984 and is similarly entitled to interest in respect to the remittance for the month of July between August 15th, 1984 and September 10th, 1984.

14. While it is well accepted that there is no jurisdiction in an arbitral tribunal to award costs in respect to an arbitration proceeding, the parties to this collective agreement have provided express language on that subject insofar as the grievance arbitration is founded on contract violations arising out of article 15 of the collective agreement. In our view, this panel of the Board, constituted with the powers of a Board of Arbitration must act in accordance with that expressed intention of the parties.

15. The evidence established that Mrs. Rae, the Administrator has been spending some four excess hours per month dealing with the delinquent reports and remittances of the respondent. Her employer, Murray Bulger & Associates bills the Fund on the basis of \$35.00 per hour. Rae's work involves special checking of accounts, following of receipt of reports and remittances and phone calls to the company in connection therewith, consulting with legal counsel, dealing with members' enquiries relative to benefit coverage dependant on remittances,

preparation of grievances for filing including meetings etc. with other staff members, preparation of arbitration referral for filing. On this basis the excess cost which is involved because of the respondent's conduct is 4 hours for each of the months of May, June and July except that in respect to these months, subject of this arbitration the accumulation of data, consultations etc. there was an additional six hours spent. Thus there is a total of 18 hours billed at \$35.00 per hour, or a total cost of \$630.00.

16. Mr. DeWit, business agent who, in respect to these delinquencies spends between 4 — 6 hours per month based on research in office to prepare materials, contacts with staff and outside personnel, attendance at meetings including settlement officers of the Board etc. We think it not unreasonable to conclude that some 4 hours per month at a cost of \$20.96 per hour in each of the three months relates to the respondent's conduct. That is a total cost of \$251.52.

17. Rae's costs and DeWit's costs are clearly as a result of their efforts to collect the delinquent accounts and fall within Article 15.03(i) of the agreement. In addition there are the legal costs involved in respect to this particular grievance which were not itemized before us.

18. In addition to these costs the collective agreement provides a "surcharge" of \$50.00 or 10% of the amount of contribution, if greater, in respect to a monthly payment not received by the Administrator by the 22nd day of the month in which such payment is due. The amounts here involved in the months of May, June and July are such that the \$50.00 surcharge is applicable and hence a total amount of \$150.00.

19. It is therefor our conclusion that the union is entitled to receive, and the Board so orders:

- (i) damages in respect to costs as expressly provided in the collective agreement amount to \$881.52 with interest. In addition the union is entitled to receive re-imbursement for out of pocket reasonable legal costs.
- (ii) payment of \$136.63 wrongfully withheld in respect to the remittance for the month of May, 1984 with interest.
- (iii) Interest payment in respect to the time delay in making remittances for the months of June and July 1984.
- (iv) A surcharge of \$50.00 in respect to each of the months of May, June and July 1984.

Where the Board has ordered payments together with interest, or payment of interest, the calculation of interest will be done in accordance with the Board's practice note and based on the formula set forth in the decision regarding *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35.

20. In addition to the above remedial relief directed by the Board pursuant to its authority under section 124 of the Act, the Board directs further remedial relief pursuant to its broad powers pursuant to section 89 of the Act. The Board orders and directs that the respondent, Standard Insulation Ltd. from the date of this Order shall not violate the collective agreement

by failing or refusing to submit reports of hours worked as provided in Article 15.02 of the collective agreement by the 15th day of any month following the month in which hours are worked, and shall not violate the collective agreement by failing or refusing to make payments to the Asbestos Workers Local 95 Benefit Fund by the 15th day of any month following the month in which hours are worked, or in any other manner. The Board further orders and directs that any reports due at the time of this Order under the collective agreement and any remittances required to be made pursuant thereto and which have not been made on a timely basis, be made to the Administrator of Benefit Fund within five working days of the date of this Order.

21. The Board further orders that the respondent post copies of the attached notice marked, "Appendix", after being duly signed by the respondent's representative, in conspicuous places on its premises where it is likely to come to the attention of the employees, and keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to ensure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the project shall be given by the respondent to a representative of the complainant so that the complainant can satisfy itself that this requirement of posting is being complied with.

22. In view of the broad relief provided the Board is of the opinion that it is not necessary or appropriate as requested by the complainant, to order the posting of a cash bond against future delinquencies or to appoint a public accountant for the monthly auditing of the respondent's compliance.

23. The Board will remain seized of this matter in the event the parties are unable to agree as to the implementation of the Board's orders.

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE TO ALL EMPLOYEES IN ORDER TO COMPLY WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. THAT ORDER WAS MADE AFTER A HEARING AT WHICH ALL INTERESTED PARTIES HAD THE OPPORTUNITY TO BE PRESENT AND TO PRESENT EVIDENCE. THE BOARD FOUND THAT WE HAD REPETITIVELY OVER A TWO YEAR PERIOD VIOLATED ARTICLE 15 OF THE COLLECTIVE AGREEMENT AND THEREBY COMMITTED A CONTRAVENTION OF SECTION 50 OF THE ONTARIO LABOUR RELATIONS ACT WHICH PROVIDES,

A COLLECTIVE AGREEMENT IS, SUBJECT TO AND FOR THE PURPOSES OF THIS ACT, BINDING UPON THE EMPLOYER AND UPON THE TRADE UNION THAT IS A PARTY TO THE AGREEMENT WHETHER OR NOT THE TRADE UNION IS CERTIFIED AND UPON THE EMPLOYEES IN THE BARGAINING UNIT DEFINED IN THE AGREEMENT.

THE BOARD HAS ORDERED THAT FROM THE DATE OF ITS ORDER WE SHALL NOT VIOLATE ARTICLE 15 OF THE COLLECTIVE AGREEMENT BY FAILING OR REFUSING TO SUBMIT REPORTS TO THE ASBESTOS AND WORKERS LOCAL 95 BENEFIT FUND TOGETHER WITH THE APPROPRIATE REMITTANCE BY THE 15TH DAY OF THE MONTH FOLLOWING THE MONTH IN WHICH HOURS ARE WORKED.

WE WILL COMPLY WITH THE BOARD'S ORDER.

STANDARD INSULATION LTD.

PER: (AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

0316-84-R Steve Crowe, Fred Downer and Mel Davis, Applicants, v. International Union of Bricklayers and Allied Craftsmen, the Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen Local #17, Respondents, v. **Stuart Riel Masonry Contractor**, Intervener

Construction Industry — Practice and Procedure — Termination — Whether applicants hired contrary to collective agreement — Whether Board policy of counting only those actually at work in unit on application date as employees inappropriate in construction ICI terminations — Whether employees in other sectors may apply to terminate ICI bargaining rights

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members I. M. Stamp and C. A. Ballentine.

***APPEARANCES:** Fred Downer, Steve Crowe and Mel Davis for the applicants; John Zanussi for the respondents; Donald D. White for the intervener.*

DECISION OF THE BOARD; November 23, 1984

1. This is an application for a declaration terminating bargaining rights. The application as originally filed named as respondent the International Union of Bricklayers and Allied Craftsmen Local #17 ("Local 17"). An interim decision which issued July 19, 1984 (now reported at [1984] OLRB Rep. July 1011) giving the Board's reasons for adjourning a hearing into the application on July 5, 1984 also named the International Union of Bricklayers and Allied Craftsmen ("the International") and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen ("the Conference") respondents to the application. The International and the Conference together constitute the designated employee bargaining agency ("the EBA") for Local 17 and all other affiliated bargaining agents of the EBA and is the trade union party to the provincial agreement with the Masonry Industry Employers Council of Ontario ("the Agreement"). The Board's interim decision also found, amongst other things, that the Agreement applies to all sectors of the construction industry.

2. When this application came on for hearing again on November 1, 1984, having regard to the submissions of the parties and for the reasons given orally at the hearing, the Board exercised its discretion under section 106(1) of the Act to reconsider its interim decision and revoke it with respect to the finding that the Agreement applied to all sectors of the construction industry. The Board ruled that it would hear the evidence and representations of the parties respecting whether the Agreement contained any bargaining rights for employees of Stuart Riel Masonry Contractor ("the employer") except those which, by operation of section 145(4) of the Act, pertain to the industrial, commercial and institutional ("ICI") sector. The parties subsequently agreed that the application of the Agreement was limited to the ICI sector and did not describe any bargaining rights in other sectors respecting Local 17, the employer and the employer's employees. The parties were also agreed that the bargaining rights held by Local 17 in sectors of the construction industry other than ICI were those described in the Board's certificate which was issued to Local 17 pursuant to an application for certification made on December 2nd, 1981.

3. Having further regard to the agreement of the parties, the Board finds that, at the making of this application, the EBA, Local 17 and all other affiliated bargaining agents of

the EBA, the employer and the employer's bricklayers, stonemasons, and plasterers and their respective apprentices, improvers and working foremen employed in the ICI sector of the construction industry in the Province of Ontario were bound to the Agreement which expired April 30th, 1984. The Board further finds that Local 17 is the exclusive bargaining agent for the employer's bricklayers and stonemasons and their apprentices when employed in sectors other than the ICI sector in the bargaining unit described in the certificate which was issued by the Board pursuant to the application for certification made December 2nd, 1981. Accordingly, the Board hereby amends its decision which issued July 19, 1984 by deleting clauses (1) and (2) of paragraph 10 and replacing them with the following:

(1) The provincial agreement between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario is an agreement without reference to sectors of the construction industry.

(2) The Board's decision which issued October 12th, 1982 declared the employer to be bound to the provincial agreement effective from May 1, 1982 until April 30, 1984, the same agreement which was in effect at the making of this application. The effect of that declaration is to bind the employer, without any limitation, to the provincial agreement.

4. Having regard to all of the foregoing, the Board finds further that, at the making of this application, there were two bargaining units of the employer's employees which the application purports to affect.

BARGAINING UNIT #1

All bricklayers, stonemasons and plasterers, their respective apprentices, improvers and working foremen employed by Stuart Riel Masonry Contractor in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

BARGAINING UNIT #2

All bricklayers and bricklayers' apprentices, stonemasons and stonemasons apprentices in the employ of Stuart Riel Masonry Contractor in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

Mr. Zanussi, the agent for the respondents, at the hearing argued that bargaining unit #2 should be geographically limited to the City of Peterborough because the application described the bargaining unit only in terms of the Municipality of Peterborough. The description of the bargaining unit in an application for termination of bargaining rights does not determine what is the appropriate bargaining unit. That is a determination which the Board is mandated to make under section 57 of the Act, which is set out later in this decision. The Board makes that finding based on the evidence before it, which it has done in making the above findings.

5. It is an agreed fact that the employees affected by this application were working in bargaining unit #2 on the date of making the application. It is undisputed that there were no employees of the employer working in bargaining unit #1 on that date and that the employer has not performed work within bargaining unit #1 since 1982. These facts raise the issue of whether the employees who were working in bargaining unit #2 on the date of the application can successfully apply to terminate the bargaining rights contained in the Agreement with respect to bargaining unit #1. The applicants seek to have the application apply to the bargaining rights respecting both units. The employer takes the position that the application should apply to both and the respondents take the position that it can apply only to bargaining unit #2.

6. The sections of the Act relevant to this application are sections 57 and 123:

“57.-(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

(b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;

(c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified,

the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

(4) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

...

"123.-(1) If a trade union does not make a collective agreement with the employer within six months after its certification, any of the employees in the bargaining unit determined in the certificate may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Notwithstanding subsection 57(2), any of the employees in the bargaining unit defined in a first agreement between an employer and a trade union, where the trade union has not been certified as the bargaining agent of the employees of the employer in the bargaining unit, may apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit after the 305th day of its operation and before the 365th day of its operation.

(3) Subsections 57(3) to (6) apply to an application under subsection (1) or (2)."

7. Each applicant filed his own application and there was no material difference in each. No separate statements of desire ("petitions") were filed in support of this application, therefore, the Board treated each application as a statement of opposition by the employees to being represented by the respondents. Accordingly, the Board heard the evidence of each applicant as to the circumstances under which his application was prepared, signed and sent to the Board. Their evidence was unchallenged and Zanussi acknowledged that the applications expressed the voluntary wishes of the applicants. Whether the Board finds the application to be an application for termination of bargaining rights respecting both bargaining units or bargaining unit #2 only, Zanussi submits that the Board should dismiss the application on the grounds that the applicants were not employees in either bargaining unit. He argues with respect to bargaining unit #1 that the Agreement, which is the source the respondents' bargaining rights for the employer's employees in the ICI sector, makes union membership mandatory. Since the applicants are not members of Local 17 or any of the other affiliated bargaining agents, even if the Board finds them to be employed in bargaining unit #1, their employment would be contrary to the hiring provisions of the agreement according to Zanussi. He contends that persons employed contrary to the hiring provisions of a collective agreement are not employees for purposes of an application to terminate bargaining rights. In this respect, he is relying on the Board's decision in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577. Zanussi submits that, for the same reason, the Board should find that the applicants are not employees in bargaining unit #2 even though there was no collective agreement covering that unit. The Board has considered his submissions in that respect, and as the Board understands his

argument, it finds no basis in the instant application on which it could make the finding requested.

8. With respect to the question of whether the applicants can apply to terminate the bargaining rights of the respondents in bargaining unit #1, employer counsel argues that, for purposes of determining which employees are affected by the application, the Act merely requires them to be employees of the employer in the bargaining unit. It does not require that they actually be working in the bargaining unit on the date of the application. Counsel did not refer the Board to any other authority in support of that position, but claimed that there are decisions of the Board which, for purposes of an application affecting bargaining rights or for purposes of eligibility to vote in representation votes, recognized employees of the employer who were not at work in the bargaining unit on the date of the particular application. Counsel argues also that, since an application for termination of bargaining rights in the ICI sector of the construction industry must be made within a specific two month period prior to the biennial expiry of a provincial agreement, a date which also is fixed by the Act, a requirement for employees to be at work in the bargaining unit on the date of application would have strange results. One result would be to fortuitously deprive employees for another two years of an opportunity to terminate bargaining rights or seek to change their bargaining agent. Another result would be to allow a situation where a solitary employee could be at work in the bargaining unit within the two month open period and make application to terminate the bargaining rights respecting other employees against their wishes because they happen to be working outside of the bargaining unit on the date of the application.

9. The applicants did not make any specific submissions to support their request that the application be applied to the bargaining rights in both bargaining units. Zanussi argued that it would defeat the purpose of the Act, which clearly distinguishes between bargaining rights in the ICI sector and all other sectors, were the Board to allow employees in bargaining units in other sectors of the construction industry to apply to terminate bargaining rights contained in provincial agreements respecting the ICI sector.

10. While, subject to section 61 and because of section 123 of the Act, the application insofar as it relates to bargaining unit #2 could have been made earlier than an application to terminate bargaining rights in bargaining unit #1, this application was made April 13, 1984, when it was timely with respect to both bargaining units. Therefore, it is clearly timely insofar as it relates to bargaining unit #1. Counsel for the employer is correct when he says there is nothing in section 57 of the Act which requires employees to be at work when an application is made. Section 57(3) requires a finding by the Board of the number of employees in the bargaining unit at the application date and the Board has complete discretion to do so, including whether employees not at work in the bargaining unit on the application date are to be counted. In the construction industry, because of the short term nature of the employment relationship, it has been the consistent policy of the Board over many years to count as employees only those employees at work on the application date. This applies equally to applications for certification and for termination of bargaining rights. Counsel's second argument seems to be that, while this approach may be sensible for certification applications, it does not make sense for an application to terminate bargaining rights. In his view, if an applicant for certification chooses the wrong date on which to make the application because it misjudged the number of employees who would be at work on that date, it can remedy its mistake, hypothetically at least, by re-applying using all or some of the same membership evidence as it used in its first application. This is not the case with an application to terminate bargaining rights, according to counsel, because of the different and stricter time limits imposed by section 57(2) of the Act.

11. If a problem with the count arises in hearing the application, in most instances it would be too late for the applicant to seek leave to withdraw the termination and file a fresh one. Generally speaking, applications to terminate bargaining rights are timely only after commencement of the last two months of operation of a collective agreement. Pursuant to section 61, if a conciliation officer has been appointed by the end of that two month period, such applications are untimely if they are made after the end of the two month period and until the further time limits of section 61 have been satisfied. In the ICI sector of the construction industry, the open period is the two months preceding April 30th of "even" years. This is because section 146(3) of the Act provides for the expiry of every provincial agreement "... on the 30th day of April calculated biennially from the 30th day of April, 1978."

12. Company counsel argues that the Board's policy for construction industry applications is too restrictive in light of the circumstances which apply to applications for the termination of bargaining rights because of the already limited open period for making such applications. Were the Board to accept that argument in this case, and it neither accepts nor rejects it, and with respect to bargaining unit #1, count anyone who worked in the unit during the two months prior to April 30th, 1984, it would not assist the applicants in this case. It is an agreed fact that there were no employees of the employer who worked in that bargaining unit during that two month period and for an extensive period before it.

13. There is nothing in evidence before the Board of any circumstances which would cause the Board to depart from its long established policy in the construction industry of counting those employees at work on the date of the application for the purpose of finding the number of employees at the application date. Therefore, on the evidence before it, the Board finds that there were no employees of the employer in bargaining unit #1 at the application date signifying that they no longer wish to be represented by the respondents.

14. With respect to bargaining unit #2, the Board finds on the evidence before it that not less than forty-five per cent of the employees of Stuart Riel Masonry Contractor in bargaining unit #2, at the time the application was made, have voluntarily signified in writing that they no longer wish to be represented by Local 17 as of May 22, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(3) of the Act.

15. As a result of the foregoing, the application is dismissed insofar as it purports to apply to bargaining unit #1 and, with respect to bargaining unit #2, the Board directs that a representation vote be taken of the employees of Stuart Riel Masonry Contractor. Those eligible to vote are:

All bricklayers and bricklayers' apprentices, stonemasons and stonemasons apprentices in the employ of Stuart Riel Masonry Contractor in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman,

on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

16. Voters will be asked to indicate whether they wish to be represented by the respondent in their employment relations with Stuart Riel Masonry Contractor.

17. The matter is referred to the Registrar for the conduct of the vote.

0752-84-R John Sinnamon on his own behalf and on the behalf of all other employees of United Plastic Components Limited, Applicant, v. The United Brotherhood of Carpenters and Joiners of America Local 3054, Respondent, v. **United Plastic Components Ltd., Intervener**

Practice and Procedure — Representation Vote — Termination — Union signing waiver — Alleging intimidatory employer statements after results of vote known — Whether waiver restricted to events closely connected to conduct of vote — Whether due diligence observed in discovering and remedying improprieties prior to vote — Employer sponsored barbecue for employees not causing Board to set aside vote

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members J. A. Ronson and C. A. Ballentine.

APPEARANCES: *Dale G. Wright and John Sinnamon for the applicant; J. D. Watson and Adam Salvona for the respondent; S. A. Bernofsky and Stephen M. Peacock for the intervener.*

DECISION OF THE BOARD; November 23, 1984

1. By decision dated October 9, 1984, the majority of the Board concluded that the representation vote held pursuant to a Board decision dated August 8, 1984 should not be set aside; Board Member Ballentine reserved his decision in the matter at that time. As per paragraph 3 of the October 9, 1984 decision, the following are the full written reasons in respect of the Board's determination to terminate the respondent's bargaining rights with the intervener company.

2. At the October 9th hearing, the Board sought to clarify the respondent's position with respect to the representation vote. That is, the Board could, in response to the respondent's allegations, set aside the vote and direct a new representation vote be held. However, if the respondent was essentially seeking the dismissal of the termination application, the appropriate route was for the respondent to request reconsideration of the August 8, 1984 decision. The respondent considered its position and determined to proceed before the Board in respect of its allegations that the vote be set aside as not reflecting the true wishes of the employees. The allegations of impropriety were not raised prior to the vote being counted and after the parties signed the usual waiver. Consequently, the Board indicated that the respondent must address the impact of the signing of the waiver on the right of the respondent to raise the allegations

and satisfy the Board that the respondent exercised due diligence in learning of the events on which the allegations are based.

3. The only witness for the union was Bradley Olmsted, who had been employed by the company for about one year by the date of layoff on August 28, 1984. On examination in chief, Olmsted stated that he and William Robson Sr., the plant superintendent, had a conversation on July 3, 1984 regarding the future of the company. Robson Sr. allegedly stated that, if the union stayed, the company would be out of business by Christmas but, if the union was out, there would be work into the next year. No other employees heard this discussion. On July 25th, Robson Sr. again approached Olmsted and the conversation was more or less the same as on July 3rd. Olmsted was on the union negotiating committee during this period. Olmsted stated the conversation was strictly between himself and Robson Sr. with "no bearing on any thing to happen in the future". However, Olmsted also stated he told other employees about the conversation, although he could not recall their names. In August, Olmsted was approached by Terry Cox, the shift foreman, at 1:30 a.m. and Cox allegedly repeated the statement that if the union stayed, the firm would be out of business by Christmas. This conversation was allegedly relayed by Olmsted to several other employees, including Tom Barry, Bill Robson Jr., Frank Arts and the maintenance man. Olmsted, however, did not tell Adam Salvona, the union business agent, of these incidents until after the representation vote had been held and the ballots counted on August 21st.

4. On that date, Olmsted also stated he saw the petitioner, John Sinnamon, on two occasions in the plant and talking to G. Luckhurst, a member of management, in front of the offices, an area visible from the plant floor. Olmsted stated he was the union scrutineer for the representation vote and signed the waiver thinking that the waiver only related to the proper conduct of the vote itself, not to prior irregular conduct. Olmsted also testified he saw a notice posted on the bulletin board that a barbecue would be held at the plant on August 23rd at 1:00 p.m. when the plant would be shut; all employees were invited, although Olmsted did not go as he had personal business. [Olmsted could not recall the date; counsel for the intervener agreed that a barbecue had been held on August 23rd and a notice posted for three weeks, i.e., since before the August 8th Board hearing ordering a representation vote.]

5. On cross-examination, a rather difficult picture emerged. Olmsted acknowledged that, as the plant was so small, everyone was on a one-to-one relationship and there were numerous conversations amongst employees, foremen and other managerial personnel throughout the day and night shift. He conceded that the company's financial difficulties were common knowledge, that he heard a lot of things on the plant floor and that it was hard to separate fact from fiction. He regarded Robson's statement about the plant closing at Christmas lightly yet Olmsted also said he considered Robson Sr. "very believable". Olmsted described his personal relationship with Robson Sr. as "good" and couldn't recall being disciplined, even verbally, by Robson Sr. in early June, 1984. Robson Sr. allegedly also told Olmsted: "I don't care about the plant, I hopefully won't be here [much longer]." Asked why he didn't mention the incidents to Salvona, Olmsted commented that people "say a hundred and one different things in a day", "it seemed to have no bearing on the future", he "didn't believe Robson at the time", "it only became important after August 21st" (i.e., the representation vote), he was "always personally worried but not enough to call Salvona." With respect to the conversation with Cox, Olmsted described the discussion as extending off-and-on for about 2-1/2 hours. The two discussed motorcycles, among other topics. Then Cox said, "if the union stays in until Christmas, they might as well lock the doors" but that was his personal opinion and added

he (Cox) shouldn't really talk about the union. Olmsted admitted he considered Cox's personal opinion "off the record", just as his opinions were "off the record".

6. Also on cross-examination, Olmsted admitted that, as a negotiator, he met with Salvona on several occasions during that period but apparently only discussed negotiating items like job security, etc. He could not recall Salvona ever asking questions to inform himself about what was happening in the plant during the summer months either. Nor did he know if Salvona asked other employees such questions; Salvona never indicated he knew of the Robson Sr. or Cox conversation. During this period, as well, Olmsted was an alternate shop steward and, after John Keller was dismissed as shop steward, he was, in effect, the acting shop steward.

7. Concerning the incidents on the day of the representation vote, Olmsted admitted the employees and management generally congregate to have a coffee as shifts changed either at a machine or at the coffee machine. Specifically, Olmsted agreed it was not unusual for Luckhurst to talk with employees on the plant floor or at the coffee machine or even on the night shift. In fact, Luckhurst had spoken to Olmsted on the day of the representation vote. At first, Olmsted stated he saw Sinnamon at the plant at 10:30 a.m. When asked if it was actually between 8:30 a.m. and 8:45 a.m., Olmsted replied that he said "in and around", that he didn't wear a watch but "I'd say [it was] later than that."

8. Before the vote was counted, there was a discussion amongst the Returning Officer, Salvona, Olmsted and, presumably Peacock and Sinnamon about the possibility of segregating a ballot. Olmsted stated he understood that they agreed to waive the segregated ballot in order to have the votes counted immediately. Olmsted agreed the Returning Officer had explained that signing the waiver meant the parties would know the results of the vote without delay. Olmsted signed the waiver with Salvona present; he read the waiver document quickly and didn't know if Salvona read it.

9. Finally, concerning the barbecue, Olmsted said he didn't see the notice posted but it might have been posted as much as three weeks earlier. Olmsted had heard that the company had held at least one Christmas party in the past but not that year (i.e., December 1983).

10. William Robson Sr., plant superintendent for the past 2-1/2 years, testified for the company. He flatly denied that he had any conversations with Olmsted about a likely plant closing if the union stayed in. In Robson Sr.'s words, "I know you're not supposed to say anything to union [members] about something like this." Robson Sr. stated that he had had a conversation with Cox, the foreman, when he (Robson Sr.) commented that the plant would go under if they didn't get rid of the union and get more financial backing. He knew the company was in financial difficulty because there were few orders and the equipment was not being repaired. On June 7, 1983, Robson Sr. stated he verbally reprimanded Olmsted for taking too long at a job and that Olmsted seemed angry.

11. On cross-examination, Robson Sr. agreed that Olmsted had been described as one of the better employees by the company president. Further, Robson Sr. and Olmsted had numerous conversations during the shifts, generally, about family and such like. He had talked about the termination notice posted in the plant with other foremen but had not discussed this with the employees. Robson Sr. reiterated his denial of his alleged statements to Olmsted about the plant closing by Christmas if the union remained. As to the company's financial difficulties, Robson Sr. stated that Luckhurst had mentioned there was a prospective partner. When that individual apparently backed out, Robson Sr. surmised the partner didn't want to be involved

because the plant was unionized. If the plant closed, Robson Sr. said he had enough experience to get another job but he was concerned about the younger men. Robson agreed that no Christmas party had been held in 1983 but, as he never attended in previous years, he didn't know how many had been held in the past. He had, however, attended the barbecue. Hot dogs, hamburgers and beer had been provided free to the 18 or 20 employees attending. A notice had been posted announcing the barbecue. The president, S. Peacock, stated at the barbecue that he appreciated what the employees had done for the company. Robson assumed that Peacock had paid for the barbecue out of his own pocket.

12. There was agreement of the parties on the fact that the company went into receivership on August 30, 1984.

13. Counsel for the respondent union submitted that the waiver form only precluded the union from attacking the conduct of the vote itself, not from raising other irregularities. The allegations involved serious threats to job security and amounted to intimidation, even if the statements about the company's financial difficulties were true. Counsel submitted that Olmsted's testimony should be preferred over Robson Sr.'s. In any event, it was undisputed that Cox, at least, had made these statements to Olmsted and this was sufficient, particularly, since Olmsted had relayed the statements to other employees. The barbecue was an attempt to bribe the employees. *Greb Industries Limited*, [1978] OLRB Rep. Feb. 89; *Bell & Howell Canada Ltd.*, [1968] OLRB Rep. Oct. 695; *McMaster University*, [1979] OLRB Rep. July 685; *Bush Gamble Company Limited*, [1972] OLRB Rep. June 644 were cited in support. The test was whether a reasonable person would have been unduly influenced in voting. Counsel asserted that there had been intimidation and bribery and, thus, that a new vote should be directed. As to the timing of the union's allegations of impropriety, counsel contended that Olmsted should be regarded as a "lay person", despite his status as a negotiator, and not subjected to a high standard of due diligence in informing Salvona. Further, counsel argued essentially that Salvona had no duty to ask about events he was unaware of. In reply, counsel distinguished *Bioshell Inc.*, *infra*, and *Crock & Block Restaurant*, *infra*. The Board was also asked to draw an adverse inference from the company's failure to call further evidence about the barbecue.

14. The petitioner, submitted that the union had not led evidence to substantiate their allegations. Moreover, the allegations were not raised until after the ballots were counted. With respect to the waiver, the union had an obligation to explain to Olmsted what signing the waiver meant.

15. Counsel for the intervener submitted that Robson Sr. acknowledged he could not remember details of all conversations with Olmsted but was certain he had not made the statements about plant closure if the union remained. Robson Sr.'s evidence should be preferred to Olmsted's on this point. Olmsted's testimony regarding the statements by Cox was not credible given Olmsted's subsequent conduct. Olmsted claimed he relayed the information to other employees. The union could have called the other employees to corroborate Olmsted. Counsel urged the Board to draw an adverse inference from the failure to do so. And, if Olmsted had told other employees, why did he not tell Salvona. Further, the Board should regard with skepticism allegations raised for the first time after the results of a vote became known. The waiver should not be disregarded since this would rescue a party from its miscalculation. Counsel stressed that Olmsted was appointed by the union to act as scrutineer and Salvona was also present for the count. *Treco Machine & Tool Ltd.*, [1981] OLRB Rep. Oct. 1503; *Crock & Block Restaurant*, [1984] OLRB Rep. Jan. 19; *Bioshell Inc.*, [1983] OLRB Rep. Dec. 1964; *Golden Griddle Restaurant*, [1983] OLRB Rep. Oct. 1651 were referred to in

support. The barbecue was described as a “red herring”: it was simply to recognize that the employees had been doing a good job under difficult circumstances; it was not a closed door meeting where threatening statements had been made. In summary, counsel asserted the union had not proved its allegations and the representation vote should stand.

16. The Board first must consider the effect of the signed waiver, i.e., whether signing that waiver precludes the union from relying on alleged employer improprieties in order to set aside the representation vote. The Board has reviewed the cases cited by the intervener as to the effect of the waiver (particularly *Bioshell*, *Treco Machine & Tool*, and *Golden Griddle Restaurant*, *supra*, as well as *Bermay Corporation*, [1980] OLRB Rep. Feb. 166). In those cases, it may fairly be said that the alleged impropriety was intimately or closely connected with the conduct of the vote itself (e.g., composition of the voters’ list, breach of the silent period). The waiver itself speaks to the regularity and sufficiency of the conduct of the vote. The allegations of impropriety alleged here (with the exception of the alleged misconduct on the day of the vote) were not closely connected to the holding of the vote. The Board is prepared to assume, without finally deciding, that the waiver does not reach beyond those events which may reasonably be said to be closely connected to the conduct of the vote so as to preclude the union from raising the allegations after signing the waiver. On this reasoning, then, the Board will not permit the union to assert that the alleged misconduct on the day of the vote is a ground for setting aside that vote. Olmsted may well be a “lay person” in some senses but he was also chosen by the union to be scrutineer and to sign the waiver. The union must bear the risk if Olmsted was not properly instructed by Salvona as to the effect of the waiver and his responsibility to at least discuss any possible improprieties concerning the conduct of the vote before the vote was counted. And, it must be remembered that Salvona, an experienced union official, was also present at the time.

17. Although the Board would not rule out consideration of the union’s allegations (except as noted in paragraph 15) because of the signing of the waiver, the union must still satisfy the Board that it has exercised due diligence in conducting inquiries as to possible impropriety on the part of the applicant and/or intervener. A Board is naturally skeptical when allegations of earlier misconduct are raised only after the outcome of a representation vote is known. The Board is not prepared to permit a party losing a representation vote to cast about for any basis upon which to set aside the vote. If improprieties occurred which could have been discovered through due diligence and founded a complaint before the Board, those improprieties could well have been remedied before the vote was conducted. Or, the ballot box could have been sealed pending the outcome of the hearing into the allegations and a new vote directed, if necessary, after the appropriate relief had been ordered. The “due diligence” standard, then, prevents a party from having “two kicks at the can”. In this case, the Board is not persuaded that the union exercised due diligence in learning of the alleged improprieties and filing the allegations. This is a very small bargaining unit for which the union is the incumbent. These are not the circumstances of an organizing campaign where a union may have difficulty in obtaining access to the workforce; rather, the union has a presence in the plant. Indeed, the union offices were in close geographic proximity to the plant as well Olmsted was a union negotiator and apparently a shop steward of some sort. He was in contact with Salvona in several occasions during the relevant time period and could easily have mentioned the alleged incidents. A final opportunity for discussing these alleged improprieties occurred when Salvona and Olmsted met before the vote was counted. Moreover, there is no evidence that Salvona, as business agent, conducted inquiries of any sort whatsoever as to possible improprieties. Salvona himself, although present at the hearing, was not called to testify as to any inquiries he may have made. For these reasons, then, the Board finds that the union has not exercised due

diligence and should not now be permitted to raise the allegations of misconduct in order to set aside the vote.

18. In any event, and in the alternative, the Board would dismiss the union's allegations of impropriety on the merits. Given the conflicting evidence of Olmsted and Robson Sr., the issue of credibility is squarely raised. In assessing credibility, the Board considered the usual factors, i.e., the consistency of their evidence, the firmness of their memory, their ability to resist the influence of interest to modify their recollections, their capacity to clearly express their recollections and their demeanour. The Board is of the opinion that Robson Sr. was truthful and candid in his responses. Olmsted, on the other hand, was evasive and contradictory. For example, Olmsted stated he took Robson Sr.'s alleged threats about plant closure seriously, yet at other points in his testimony he stated he regarded those comments lightly. Olmsted testified that he told the employees about the alleged statements, yet didn't regard the statements seriously enough to tell Salvona, the business agent. The Board need not recount other examples. Thus, the Board does not accept Olmsted's version of Robson Sr.'s statements on July 3, 1984 and on July 25, 1984. The Board is further prepared to draw an adverse inference from the union's failure to call any of the employees allegedly told about Robson Sr.'s comments. The Board would also add that the fact that the alleged improprieties were only raised after the results of the vote were known coupled with the explanation for delay does not assist Olmsted's credibility. In view of the Board's evaluation of Olmsted's credibility generally, the Board does not accept Olmsted's testimony with respect to statements allegedly made by Cox in August, 1984, as constituting threats to job security. Moreover, Olmsted's testimony, even taken at face value, amounts to no more than two individuals exchanging personal opinions about a number of topics in a casual conversation lasting, on-and-off, about 2-1/2 hours. Thus, the Board finds that the union has not proved any of its allegations with respect to statements by Robson Sr. and Cox.

19. The Board must then consider whether the holding of the barbecue was improper and, if so, sufficient to warrant setting aside the vote. The evidence on the barbecue was not particularly detailed. Robson stated a notice was posted about the barbecue; Olmsted said he didn't see the notice but it might have been posted as much as three weeks earlier; i.e., before the date the representation vote was even ordered. Olmsted could not recall the date of the barbecue but counsel for the intervener agreed a barbecue had been held on August 23rd and a notice posted for the three weeks prior to the event. The uncontradicted testimony of Robson Sr. was that the president, S. Peacock, stated he appreciated what the employees had done for the company. The Board has often held that the employer may not use its dominant position and right of free speech to overtly or subtly threaten employees about employment conditions or job security: *Dylex Limited*, [1977] OLRB Rep. June 357, upheld 77 CLLC ¶14,112 (Ont. Div. Ct.); *Viceroy Construction Co. Ltd.*, [1977] OLRB Rep. Sept. 562; *The Globe and Mail*, [1982] OLRB Rep. Feb. 189 and the cases cited therein. In this case, however, there was no evidence of any suggestion or statements by management that could be construed as threats to job security or of a nature which the Board has regarded as improper. Nor was there any evidence that the barbecue was comparable to the circumstances of a "captive audience". The Board does not regard any allegations of impropriety on the part of management at the barbecue to have been substantiated — or even alleged — other than the mere fact that the barbecue was held. And, the Board is not prepared to order a new representation vote merely because there was a barbecue for the employees.

20. The Board, in paragraph 16 above, refused to hear the alleged irregularities on the day of the vote since the union had signed the usual waiver. However, the Board finds nothing

unusual in one or two conversations between Sinnamon and Luckhurst on the day of the representation vote. Luckhurst regularly had conversations with employees during the day (according to Olmsted) and even had a conversation with Olmsted on the date of the vote (also acknowledged by Olmsted). Thus, even on the merits, these matters add nothing to the union's position.

21. The approach to requests to set aside a representation vote was set out in *Greb Industries Limited, supra*, at para. 14:

14. In evaluating conduct which leads up to the holding of a representation vote so as to determine whether that vote ought to be set aside, the Board has sought to establish whether the employees were capable of freely expressing their wishes in that representation vote. The party which seeks to set aside a representation vote is required to establish that the impugned conduct has deprived the employees of the ability to freely express their true wishes. See the *Alcan Building Products Limited* case, [1971] OLRB Rep. Dec. 806. The effect of impugned conduct upon the employees is determined by looking at the objective facts of what has occurred and drawing reasonable inferences as to what is the more probable effect of such conduct upon the employees in all the circumstances, see the *Wolverine Tub, Division of Calumet & Hecla of Canada Ltd.*, case 63 CLLC ¶16,296. This is an objective test. The Board's approach is to determine the likely effect of the impugned conduct upon an employee of average intelligence and fortitude.

(See also *Crock & Block Restaurant, supra*). Management threats to the job security of employees should a certification application be successful (or, conversely, if a termination application fails) are regarded seriously by this Board. However, in this case, as stated above, the Board finds that the union has not substantiated its allegations of impropriety, let alone met the test in *Greb* that "the impugned conduct has deprived the employees of the ability to freely express their true wishes."

22. The Board, then, as set out in the decision of October 9, 1984, would not set aside the representation vote for the above-stated reasons.

2287-83-U;2526-83-U Ansia Mordowanec, Complainant, v. Ontario Nurses' Association and Windsor Western Hospital (Riverview Unit), Respondents; Ontario Nurses' Association, Complainant, v. **Windsor Western Hospital** (Riverview Unit), Respondent

Duty of Fair Representation — Interference in Trade Unions — Practice and Procedure — Remedies — Unfair Labour Practice — Employer preventing meaningful union representation at disciplinary meeting contrary to s.64 — Greivor represented by union official with conflict of interest — Arbitrary and discriminatory — Letter of resignation extracted through employer and union unlawful conduct upheld at arbitration — Not res judicata to prevent Board determining unfair labour practice complaint — Board directing recommencement of arbitration — Whether ill-will prerequisite to finding of discrimination

BEFORE: Kevin M. Burkett, Vice-Chairman, and Board Members A. Grant and B. K. Lee.

APPEARANCES: *Donald F. Hersey, Q.C. and David Murray for the Ontario Nurses' Association; George W. King, Leonard P. Kavanaugh, Q.C., Sharon R. Morris, A. J. Lopes and M. I. Whiteside for the respondent hospital; Mary Cornish, Susan Sapin and Ansia Mordowanec for the complainant Ansia Mordowanec.*

DECISION OF THE BOARD; November 9, 1984

I

1. The Board directs that the above complaints be and the same are hereby consolidated.
2. The Board has before it two complaints. The first, filed by Mrs. A. Mordowanec on January 5, 1984, alleges that the union breached its duty of fairrepresentation under section 68 of the Act in its representation of her in connection with her termination from employment on June 9, 1982. The first complaint was later amended to include an alleged breach of sections 64 and 66 of the Act against the employer hospital. The second complaint, filed by the union, alleges that the employer hospital violated sections 64 and 66 of the Act in its handling of the disciplinary meeting held on June 9, 1982. More specifically, it is alleged that the Hospital interfered with the union's right to represent Mrs. Mordowanec at that meeting.
3. The Board heard a number of preliminary arguments and hereby confirms its oral rulings given at the hearing. With respect to the objection of the respondents that the Board should not hear the complaint filed by Mrs. Mordowanec because of the delay in the filing of the complaint, the Board ruled as follows:

The Board has a discretion under section 89 of the Act to either entertain or refuse to entertain a complaint. The Board has exercised this discretion to refuse to hear complaints which are untimely in the sense that there has been an "extreme" delay in the filing of the complaint such that the respondent(s) would be prejudiced if the complaint was to be heard on the merits. The factors which are considered by the Board in exercising its discretion in this regard are set out at paragraph 22 of *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420. Although this is by no means an easy case, on a consideration of these factors we are not prepared

to rule that we should refuse to hear the complaint on its merits because of the delay in the filing of the complaint. This is not to say that the grievor is not partially to blame for the delay and, if successful on the merits, that the award of compensation against either the Hospital and/or the Ontario Nurses' Association should not reflect this fact.

With respect to the objection raised that the Board should apply a doctrine analogous to *res judicata* and find that the issue of the voluntariness of Mrs. Mordowanec's resignation has already been decided on the basis of the same facts that will be put in evidence in this matter, the Board ruled as follows:

It is acknowledged that this matter is not *res judicata* but rather, it is argued that on the basis of similar principles the Board should exercise its discretion under section 89 of the Act not to entertain this matter. The award of Arbitrator Palmer is relied upon in this regard. While we acknowledge that on a reading of that award, including the dissent, the arbitrator was aware that the grievor did not receive the representation she sought at the meeting of June 9, 1982 in coming to the decision that she voluntarily quit her employment on that date, it was never put to the arbitrator that the decision of the local union to provide to the grievor at that meeting a representative who was not aligned in interest with her constituted a breach of section 68 of the Act or that the conduct of the Hospital in connection with this meeting breached section 64 of the Act. Indeed, although such an argument might have caused the arbitrator to put his mind to the quality of the representation vis-a-vis section 68 of the Act he had no authority to rule upon an alleged breach of that section in any event. This Board has the exclusive jurisdiction to determine if the Act has been violated. There is a *prima facie* complaint of a serious violation of section 68 before us that we are not prepared to dismiss on the preliminary grounds suggested by counsel for the respondent Ontario Nurses Association. There is also before us an alleged breach of sections 64 and 66 of the Act. It is within the exclusive jurisdiction of the Board to determine these matters.

We reiterate that any question as to whether the grievor has a statutory right to representation at the point of discharge, and if so, whether that representation was adequate, and whether it was unlawfully interfered with, are all questions confined to this tribunal's exclusive jurisdiction.

II

4. With this background we turn to the evidence. Mrs. Mordowanec, a registered nurse with 27 years' service at the hospital, was suspended on May 31, 1982 pending an investigation for allegedly force-feeding a patient who subsequently aspirated and had to be rushed to a general hospital. Her charge nurse at the time of the alleged wrongdoing giving rise to the suspension was Mrs. Mary DeByl-Wowchuk. Mrs. DeByl-Wowchuk, as charge nurse, filed a report critical of Mrs. Mordowanec with Mrs. M. I. Whiteside, the Director of Nursing. Mrs. DeByl-Wowchuk, in her capacity as a charge nurse, had previously filed other reports with Mrs. Whiteside which were critical of the grievor. Mrs. DeByl-Wowchuk was also the president of the local union at all relevant times.

5. Mrs. Mordowanec was contacted by Mrs. Whiteside on June 8, 1982, and advised that the Hospital had completed its investigation, and asked to attend a meeting that afternoon. She replied that she was unavailable and was then told that the meeting would be at 10:00 a.m. the next morning and that she would be represented by Mrs. DeByl-Wowchuk. Mrs. Mordowanec's immediate response was that she wanted someone else to represent her. The day shift union representative was away on vacation at the time and, therefore, was unavailable. Mrs. Whiteside called back to say that the time of the meeting could not be changed and that Mrs. DeByl-Wowchuk would be her representative. Mrs. Mordowanec advised Mrs. Whiteside that she was scheduled to meet with the union's employee relations officer from London (Ms. Jan Davidson) at 4:00 p.m. and again asked to have the meeting postponed so that Ms. Davidson could be in attendance. Mrs. Whiteside again refused her request. There was no evidence led by the Hospital to explain why the meeting could not have been postponed until the afternoon when the representative sought by Mrs. Mordowanec would have been available.

6. Ms. Davidson was called to testify by the union. It is her evidence that Ms. DeByl-Wowchuk, the union president, called her on June 2, 1982 and advised her of Mrs. Mordowanec's suspension and asked her to handle the case on behalf of the union because she had professional concerns with respect to the nursing practice of Mrs. Mordowanec. Ms. Davidson acknowledged in cross-examination that she concluded from her conversation with Ms. DeByl-Wowchuk on June 2nd that she "probably had profound concerns with respect to Mrs. Mordowanec's right to practice" and was "not in a position to represent Mrs. Mordowanec." Ms. Davidson called Mrs. Mordowanec on June 2nd, the same day she had spoken with Mrs. DeByl-Wowchuk, and arranged to meet with her in Windsor at 4:00 p.m. on June 9, 1982. Mrs. Mordowanec in turn called her on June 8th when advised of the meeting set for 10:00 a.m. on June 9th. It is Ms. Davidson's evidence that Mrs. Mordowanec said that she did not want Mary DeByl-Wowchuk there and requested her attendance instead. Ms. Davidson asked her to arrange an extension which, as we have recounted, she was unsuccessful in doing. Ms. Davidson testified that at this time she told Mrs. Mordowanec not to commit herself to anything and not to sign anything. Mrs. Mordowanec denies that she was so advised. Mrs. DeByl-Wowchuk also called Ms. Davidson and asked her to attend the meeting scheduled for 10:00 a.m. on June 9, 1982. Ms. Davidson was already committed to a 10:00 a.m. meeting at the Windsor Health Unit and, therefore, instructed Mrs. DeByl-Wowchuk to attend and told her "to take notes only and not to say anything." It is Ms. Davidson's evidence that she gave this instruction because she did not want Mrs. Mordowanec prejudiced and so that she could use the notes to represent Mrs. Mordowanec at another point. Ms. Davidson acknowledged in cross-examination that she did not advise Mrs. Mordowanec that Mrs. DeByl-Wowchuk would only be taking notes; that she did not contact the Hospital herself with a view to having the meeting rescheduled, that she did not tell Mrs. Mordowanec not to attend or provide her with a phone number at which she could be reached during the course of the meeting, that she did not tell Mrs. DeByl-Wowchuk to make sure that Mrs. Mordowanec did not sign anything and that she made no attempt to have the afternoon shift representative or the night shift representative stand in for the day shift representative in place of Mrs. DeByl-Wowchuk. She explained that it never occurred to her that the Hospital might attempt to obtain a resignation from Mrs. Mordowanec. She testified as well that she never thought of attempting to substitute the afternoon shift or night shift representative for Mrs. DeByl-Wowchuk.

7. The collective agreement between the Hospital and the Association under which the suspension of Mrs. Mordowanec and subsequent discipline meeting was carried out is very specific with respect to the representation rights of those covered by it. The collective agreement

provides in part as follows:

ARTICLE 6 – REPRESENTATION AND COMMITTEES

- 6.08 The Hospital agrees to give representatives of the Ontario Nurses' Association access to the premises of the Hospital for the purpose of attending grievance meetings or otherwise assisting in the administration of this Agreement, provided prior arrangements are made with the Administrator. Such representatives shall have access to the premises only with the approval of the Administrator which will not be unreasonably withheld.

ARTICLE 7 – GRIEVANCE PROCEDUREUR

- 7.01 For the purposes of this Agreement, a grievance is defined as a difference arising between the parties relating to the interpretation, application, administration or alleged violation of the Agreement including any question as to whether a matter is arbitrable.
- 7.02 At the time formal discipline is imposed or at any stage of the grievance procedure, including the complaint stage, a nurse is entitled to be represented by her nurse representative.

8. Mrs. Mordowanec attended the meeting with the Hospital scheduled for 10:00 a.m. June 9, 1982. Present at the meeting besides Mrs. Mordowanec and Ms. DeByl-Wowchuk were Mrs. Whiteside, the Director of Nursing, Mrs. G. Sahli, the senior nursing supervisor, and Mr. Cainen, an administrative assistant. Mrs. Whiteside opened the meeting by advising the grievor that she had the choice of resigning her employment or being terminated. It is Mrs. Mordowanec's uncontradicted evidence that she asked to have the meeting postponed so that she could seek advice from Ms. Davidson, a lawyer or her husband. Her request was refused. It is her uncontradicted evidence that Mrs. Whiteside said she could not wait until 4:00 p.m. Mrs. Mordowanec testified that she was confused and upset and understood from what was said to her at the meeting that if she resigned she would not be reported to the College of Nurses. After holding the letter of resignation for ten or fifteen minutes and asking once more for time to seek advice, and being refused, Mrs. Mordowanec signed the letter.

9. Mrs. DeByl-Wowchuk, as instructed, did not speak throughout the meeting but took notes of what was said. She did not make representations in support of Mrs. Mordowanec, nor did she advance any opinion or argument with respect to whether or not the employer's conduct was in accordance with the collective agreement which prohibits the discharge of employees without just cause. Mrs. DeByl-Wowchuk did not seek to represent Mrs. Mordowanec, but merely recorded the details of her discharge. The notes which she took were put in evidence by the Hospital and were accepted by Mrs. Mordowanec as essentially accurate. They read in part as follows:

Mrs. Whiteside then asked Mrs. Mordowanec if she would resign or not.

Mrs. Mordowanec said she wanted to talk to the "lady from London" (referring to Jan Davidson) her husband, and a lawyer before deciding. Mrs. Whiteside asked Mr. Cainen if this could be allowed and Mr. Cainen

stated that a decision had to be made at the meeting. Mrs. Mordowanec again stated she wanted to wait till she had spoken with her husband and the “lady from London.” Mrs. Whiteside stated she would not wait for an answer and if she refused to resign she would be given a Letter of Dismissal.

Mr. Cainen interjected again and told Mrs. Mordowanec that she was being given a choice to resign but if she did not resign, she would be terminated as of the day of the incident. “Thus logically” it followed that if Mrs. Mordowanec resigned it would still be a termination but it would not coincide with the date of the incident. Mrs. Mordowanec again stated she wanted to wait until she spoke with the “lady from London.” Mr. Cainen again spoke telling Mrs. Mordowanec that no one could influence her decision, especially when talking about a resignation — that such a decision could only be made by her. Mrs. Mordowanec agreed that such a decision “could only be made by me.”

Mr. Cainen interrupted that the purpose of the meeting was not to discuss the incident but rather to allow Mrs. Mordowanec the choice to resign. Mrs. Whiteside then gave the letter to Mrs. Mordowanec telling her that the letter was the acceptance by Mrs. Whiteside of Mrs. Mordowanec’s verbal resignation and that it required Mrs. Mordowanec’s signature. Mrs. Mordowanec read the letter and again stated she wanted to talk it over first before she signed.

Mrs. Whiteside then informed Mrs. Mordowanec that if she chose not to resign then on her dismissal Mrs. Whiteside would report her to the College of Nurses for Professional Misconduct. Mrs. Mordowanec asked what would be reported and Mrs. Whiteside informed her it would be things such as the incident, past evaluations and other reports and incidents. Mrs. Whiteside went on to explain that there was a complaints procedure and that a Complaints Officer would come and speak to Mrs. Mordowanec, go thru [sic] her file and question other staff who had worked with Mrs. Mordowanec. The findings of the Complaints Officer would be brought before the Complaints Committee and if warranted, would go before the Council of Nurses.

Mrs. Mordowanec then asked “what worse could be done to me than what you have done to me already?” Mrs. Whiteside informed Mrs. Mordowanec that the Council could take Mrs. Mordowanec’s registration away from her prohibiting her from practising in the Province of Ontario.

Mr. Cainen went on to say that it would look better to resign than to be terminated-and if she ever wanted to work somewhere else — Mrs. Mordowanec interrupted with — “work somewhere else Ha!” in a scornful tone, then Mr. Cainen continued. It would look better to say you had resigned. Mrs. Mordowanec remarked — “Oh sure and they would call Mrs. Whiteside and that would be it.” Mr. Cainen then asked Mrs. Mordowanec to pass the letter back if she was not going to sign.

Mrs. Mordowanec then said “where do I sign.” Mrs. Sahli showed

Mrs. Mordowanec where to sign. Mrs. Whiteside stated again to Mrs. Mordowanec that by signing the letter she was resigning and that the letter was Mrs. Whiteside's acceptance of Mrs. Mordowanec's verbal resignation. Mrs. Mordowanec signed but kept the letter in her hand and asked that if she decided at home that she didn't want to sign after talking to her husband would they destroy the letter. Mrs. Whiteside stated that by signing the letter she had resigned and that the letter would not be destroyed. Mrs. Mordowanec replied "nobody is safe here."

Mr. Cainen then said again that by signing the letter she had resigned but if someone called later about the letter it would not be destroyed, however they were willing to make copies of the letter and she could take them home.

Mrs. Mordowanec then passed the letter back stating "I still don't know if this is right."

10. Ms. Davidson visited Mrs. Mordowanec at her home at 4:00 p.m. on June 9th (following the above-described meeting) as she had promised. She found Mrs. Mordowanec extremely distraught. She testified that she was surprised to learn that Mrs. Mordowanec had signed a letter of resignation and that she convinced her that she should sign another letter revoking her resignation. Ms. Davidson delivered the letter revoking the resignation to the Hospital that evening. The response of the Hospital was that even of Mrs. Mordowanec had not resigned she was terminated for cause. Ms. Davidson acknowledged in cross-examination that if Mrs. Mordowanec had been represented at the discipline meeting she would have been advised not to sign the resignation letter. She testified that representatives are instructed to attempt to prevent employees from committing themselves and that any nurses' representative who had attended a union workshop would have known that Mrs. Mordowanec, who had been employed as a nurse at the Hospital for some 27 years, should not sign the letter of resignation. She acknowledged that if she had been at the meeting she would have put Mrs. Mordowanec straight with respect to the requirement of the Hospital to report her to the College regardless of whether she resigned or was terminated.

11. The Hospital did report Mrs. Mordowanec to the College of Nurses. A hearing was held to deal with the six typed pages of charges against her and in a decision of the discipline committee dated October 18, 1983 a finding of not guilty of Sections 83(3) and (4) charges of professional misconduct and incompetence was made. The action taken by the College was to dismiss the charges. For our purposes the relevant fact with respect to the College of Nurses proceeding is that Ms. DeByl-Wowchuk filed a lengthy statement with the College dated September 27, 1982 chronicling a number of alleged improper incidents involving Mrs. Mordowanec. She later testified against Mrs. Mordowanec at the hearing before the college.

12. The union grieved the termination of Mrs. Mordowanec. By way of a preliminary objection to the jurisdiction of the arbitration board to hear the matter, the Hospital took the position that Mrs. Mordowanec had not been terminated but had resigned her employment. The majority of the arbitration board, chaired by Professor Palmer, which heard much of the same evidence that was put before this Board, in upholding the preliminary objection of the Hospital and denying Mrs. Mordowanec a hearing on the merits, ruled as follows:

Having considered the foregoing, it is the view of the Board in this matter that the grievance must be dismissed and the Company argument accepted.

As the Board understands the arbitral jurisprudence in this area, the cases cited all go to the question of whether the decision of the relevant grievor to resign as opposed to be terminated is one which is, in fact, the true wish of the grievor. Put another way, the cases in question suggest that in some circumstances statements of grievors that they wish to resign are not indicative of the true feelings of that grievor and, consequently, it is inappropriate to hold that grievor to such a position. In this regard, the circumstances of all the cases in question deal with the facts which would support the question of whether this is a "true view" of the relevant grievor.

Given this approach to the cases set out above, it would seem that the Hospital position is correct. In this regard, the evidence clearly discloses that the grievor, Mrs. Mordowanec, was aware that at the hearing on June 9th the question of her dismissal would arise. Obviously, she wished as much support in coming to a decision as to the appropriate course of action on this matter as would be available. However, on the day before this meeting she was apprised of the Hospital position on this matter, i.e., she would not be allowed representation by an Association Representative from London, but only by Mrs. DeByl-Wowchuk. Consequently, she came to the meeting knowing the position of her Employer in this regard.

Looking at the evidence of the hearing, it is clear that the grievor was agitated and wished further assistance as to what she should do. This, however, was refused by the Hospital. At that point, Mrs. Mordowanec was in a position where she could refuse to continue in the hearing and accept the results of this course of action or make her decision. In fact, she accepted the latter option. Indeed, her evidence suggests that she did this under the mistaken belief that this might preclude further difficulties in other areas. In this regard, she was clearly mistaken, but this was not the fault of the Employer. The obvious result, however, is that Mrs. Mordowanec had come to the conclusion, on whatever basis, that the appropriate course of action for her to take was to resign. She took this course of action. Consequently, at the time of her decision to resign, as witnessed by the written document given to the Hospital, there can be little question that this was her true intent and that this had been passed to the Hospital.

The basic case for the grievor, in the view of the Union, is that she changed her view subsequent to the meeting. In other words, she had second thoughts about what she should do. This, of course, is witnessed by her question at the time she signed the document whether she could later withdraw it and received a negative response. As stated by counsel for the Hospital, it seems unreasonable that a person, in the circumstances of this case, should ask whether she could later change it and be given a negative answer and be later allowed to act to the contrary. Mrs. Mordowanec was given the opportunity to decide the appropriate course of action and she chose it. It is not sufficient, in the opinion of the Board, to say that the alternative of dismissal was some form of undue duress which should somehow cloud the issue in her favour.

In result, then, the decision of this Board is that Mrs. Mordowanec, in effect,

had terminated her employment by her voluntary resignation on June 9th. Consequently, having reached this decision, she was not in a position to withdraw it at a later date and subsequently file the grievance in question.

In result, then, this grievance is dismissed.

The Association argued that the resignation was involuntary and, therefore, should not be given effect. It was not argued before the Palmer Board, as it is before us, that the conduct of both the Association and the Hospital in the treatment of Mrs. Mordowanec in respect of the time as of which and the manner in which the disciplinary meeting of June 9, 1982 was conducted, was in breach of the *Labour Relations Act*. The arbitration board did not have to decide, as this Board must, whether the resignation letter upon which it based its decision was the product of a double illegality: a breach of the union's duty of fair representation combined with refusal by the employer to permit active union representation in support of Mrs. Mordowanec.

13. There were no witnesses called to testify by the Hospital.

III

14. Counsel for Mrs. Mordowanec argues that even if we accept the evidence of Ms. Davidson that she counselled Mrs. Mordowanec not to sign anything in advance of the June 9th meeting with the Hospital management, the failure of the Association to provide representation at the June 9th meeting or to take any steps to have the meeting adjourned constitutes a breach of Section 68 of the Act. Counsel argues that Mrs. Mordowanec was discriminated against within the meaning of section 68 of the Act because she received no representations in circumstances where, *prima facie*, employees covered by the collective agreement are entitled to and receive representation. Counsel further argues that Mrs. Mordowanec was the victim of bad faith within the meaning of section 68 of the Act, in that the Association president, who was hostile to Mrs. Mordowanec, did not disqualify herself from appearing at the June 9th meeting for the ostensible purpose of representing Mrs. Mordowanec and then remained silent and allowed Mrs. Mordowanec to sign a letter of resignation. This complainant submits that once the letter of resignation was signed, the subsequent actions of Ms. Davidson could not and, indeed, did not cure the damage that had already been done. Finally, the complainant argues that the total lack of representation accorded Mrs. Mordowanec, in the face of what must be found to have been the Association's knowledge that a critical job interest was at stake, constitutes arbitrary conduct on the part of the union within the meaning of section 68 of the Act.

15. Turning to the allegations against the Hospital under sections 64 and 66(c) of the Act, counsel for Mrs. Mordowanec argues that we must infer from the reports filed by Mrs. DeByl-Wowchuk in respect of the professional competence of Mrs. Mordowanec, including the report that precipitated the investigation preceding the June 9th meeting, that the Hospital knew that Mrs. DeByl-Wowchuk had a conflict of interest vis-a-vis the representation of Mrs. Mordowanec. In the face of its knowledge of this conflict of interest and the evidence that it required her attendance at the June 9th meeting and repeatedly refused Mrs. Mordowanec's requests for an adjournment (both before and during the meeting) so that she could obtain representation, and in the absence of any explanation from the Hospital as to why it could not have adjourned the meeting for a few hours, to allow Mrs. Mordowanec time to obtain the representation to which she was entitled, this complainant asks us to find that the Hospital interfered with Mrs. Mordowanec's right to union representation in contravention of sections

64 and 66(c) of the Act. The complainant maintains that the resignation of Mrs. Mordowanec was obtained by means of the unlawful conduct of both the union and the Hospital and, therefore, cannot be relied upon by the Hospital. In the alternative, it is argued that the remedial authority of the Board under section 89 of the Act gives the Board the power to order a hearing on the merits in response to the Association's breach of section 68 of the Act.

16. The Association disputes that a breach of Section 68 has been established. The Association maintains that the standard under Section 68 is not one of perfection and, while the Association could have conducted itself differently, it argues that the most that has been established is perhaps certain inadvertent errors on its part. The Association cautions the Board against engaging in an exercise of "Monday morning quarterbacking" in respect of the quality of its representation of Mrs. Mordowanec. The Association submits that in the face of the evidence that Ms. Davidson did not know what position the Hospital would take at the June 9th meeting, that she nevertheless unsuccessfully attempted to have the meeting time changed to 4:00 p.m. through Mrs. Mordowanec, counselled Mrs. Mordowanec not to sign anything at that meeting, instructed Mrs. DeByl-Wowchuk to take complete notes and, subsequent to the letter of resignation having been signed, solicited a retraction from Mrs. Mordowanec and delivered it to the Hospital, filed a grievance on behalf of Mrs. Mordowanec which was processed to arbitration and assisted Mrs. Mordowanec before the College, a finding of arbitratory, discriminatory or bad faith conduct within the meaning of Section 68 cannot be found. The Association asks the Board to find that it has not breached its duty of fair representation in respect of Mrs. Mordowanec.

17. The Association adopts the arguments advanced by the complainant in support of its allegation that the Hospital breached Sections 64 and 66 of the Act. The Association submits that on the evidence it must be found that Mrs. Whiteside knew that Mrs. DeByl-Wowchuk was opposed in interest to Mrs. Mordowanec and that it refused to delay the meeting because it did not want Ms. Davidson there to represent her. The union asks the Board to find that Mrs. Mordowanec was entitled to unbiased objective representation and argues that the refusal of the Hospital to delay the meeting when it knew that she would not have the type of representation to which she was entitled at that meeting and when it knew that it would be presenting her with the alternative of resigning or being terminated, constitutes a breach of the Act. The union submits that the Hospital cannot rely on the collective agreement as a defence to its refusal to adjourn the June 9th meeting until Mrs. Mordowanec could be properly represented. Having already found that the issue before the Board is not *res judicata*, the Association submits that the Board has the authority to refer it back to arbitration for a hearing on the merits.

18. The Hospital reminds the Board that it has an obligation to ensure the care of its patients and submits that it acted under this obligation at all relevant times and assumed at all relevant times that the Association conducted its affairs properly. The Hospital submits firstly, that it did not know in advance of the June 9th meeting that there was a conflict between Mrs. DeByl-Wowchuk and Mrs. Mordowanec as would have prevented Mrs. DeByl-Wowchuk, as association president, from representing Mrs. Mordowanec at the June 9th meeting. The Hospital draws a distinction between actions taken by Mrs. DeByl-Wowchuk as charge nurse, on the one hand, and as association president, on the other. The Hospital submits secondly that it did not know in advance of the June 9th meeting that Mrs. DeByl-Wowchuk had been instructed to take notes but not to speak at that meeting. The Hospital submits thirdly, that Mrs. Mordowanec knew that the meeting of June 9th concerned her continued employment and that she would be represented by Mrs. DeByl-Wowchuk and that she voluntarily consented

to attend. The Hospital argues that in the absence of the day shift representative, Mrs. DeByl-Wowchuk, as the highest ranking elected official of the local, was properly present as a representative of Mrs. Mordowanec at the meeting of June 9th and that the Hospital could assume that she would be fulfilling her duty as a representative. The Hospital also submits that Mrs. Mordowanec acknowledged in her evidence that she would have resigned regardless of who was there to represent her. In all of these circumstances, the Hospital argues that it cannot be found that it in any way interfered with the rights of Mrs. Mordowanec under the *Labour Relations Act* or under the collective agreement. The Hospital submits that absent any finding of a breach of the Act by it, the Board cannot frame a remedy to a section 68 breach that runs against it. In any event, the Hospital argues that the Board does not have an appellate function in respect of a binding arbitration award made pursuant to the mandatory arbitration provisions of the Act. It is the position of the Hospital that an arbitration award handed down by a properly constituted arbitration board following a fair and impartial hearing, as with the award of the Palmer Board in this case, cannot be overruled or in any way interfered with by this Board. The Hospital submits that regardless of a possible 68 breach by the Association, the finding of the arbitration Board that Mrs. Mordowanec resigned from her employment is *res judicata* and must stand. In summary, the Hospital asks the Board to find that it did not breach the Act and further submits that if the Association breached section 68 of the Act, the remedy for that breach must go against the Association but, in any event, the remedial authority of the Board does not extend to overturning the award of the board of arbitration that Mrs. Mordowanec voluntarily resigned from her employment.

IV

19. The standard against which the Board will assess the representation provided by a trade union to its individual members in determining whether or not the trade union has been arbitrary within the meaning of section 68 of the Act is set out in *ITE Industries*, [1980] OLRB Rep. July 1001 as follows:

It is clear that in order to establish a breach of section 60 [now section 68], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond the parameters and do not attract liability.

While implausible, summary or reckless actions attract Section 68 liability as arbitrary, honest mistakes, innocent misunderstandings and simple negligence do not. However, the Board has made it clear that in assessing the quality of the representation provided by a trade union it will do so in light of the importance of the job interest that is at stake (see *Re Walter Princesdomu*, [1975] OLRB Rep. May 444, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190 and *Swing Stage Ltd.* [1983] OLRB Rep. Nov. 1920).

20. There is some divergence in the jurisprudence with respect to whether subjective ill will is a necessary requirement to a finding of discriminatory treatment under section 68 or whether a finding of discriminatory treatment can be made on the basis of objective differences

in the quality of representations between members regardless of the presence or absence of subjective ill will. The Board stated in *Douglas Aircraft Canada Ltd.*, [1976] OLRB Rep. Dec. 779, that hostility or subjective ill will are not prerequisites to a finding of discriminatory treatment within the meaning of Section 68 of the Act. Similarly, the definition of discrimination found in *Savage Shoes*, [1983] OLRB Rep. Dec. 2067 does not require hostility or objective ill will. Discriminatory conduct is defined in that case as:

the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns.

However, in a number of other cases the Board has tied discriminatory conduct to ill will or hostility (see for e.g., *Walter Princesdomu*, *supra*; *Antonio Melillo*, [1976] OLRB Rep. Oct. 613; *De Havilland Aircraft of Canada Limited*, [1979] OLRB Rep. Oct. 933).

21. The term “bad faith” as found in Section 68 of the Act has been consistently interpreted by the Board to refer to the absence of honesty or the existence of personal animosity in union decision-making as it impacts upon individual employees (see *Savage Shoes*, *supra*; *Walter Princesdomu*, *supra*).

22. The divergence in the jurisprudence with respect to whether subjective ill will is a requirement of discriminatory treatment under section 68 of the Act, can be reconciled, for all practical purposes, by reference to the definitions of “arbitrary” and “bad faith” that have been developed by the Board. Conduct that is found to be either “arbitrary” or in “bad faith” will also be “discriminatory” in that it will result in a difference in treatment that has no labour relations rationale. This is so even though there may not be any subjective ill will in the discrimination resulting from arbitrary union conduct. Given the policy reasons underpinning the Board’s reluctance to hold a union liable for honest mistakes or simple negligence, we are hard pressed to imagine the circumstances which might cause the Board to make a finding of discriminatory conduct that would not also result in a finding of either arbitrary conduct or bad faith. In our view, the terms “arbitrary”, “discriminatory” and “bad faith”, as they are used in section 68 of the *Labour Relations Act*, must be read together as prohibiting union conduct in the representation of those for whom it holds bargaining rights that is implausible, summary, reckless or motivated by hostility or subjective ill will.

23. We must now scrutinize the conduct of the Association in this matter against the statutory duty of fair representation as it has been defined by the Board. The evidence establishes that a critical job interest (the continued employment of a registered nurse with 27 years’ service) was at stake and that the Association, which knew that Mrs. Mordowanec had been suspended pending an investigation of her conduct vis-a-vis the treatment of a patient at the Hospital and which had negotiated the collective agreement provisions which entitle a nurse covered by the agreement to be represented at the time discipline is imposed, knew or ought to have known that a critical job interest was at stake. Under the terms of the collective agreement Mrs. Mordowanec was entitled to be represented by a nurse representative at the meeting of June 9, 1982. Mrs. DeByl-Wowchuk, who was both association president and charge nurse over Mrs. Mordowanec at the relevant time, considered herself in a conflict of interest vis-a-vis her professional duty as a charge nurse and her duty as association president and stand-in nurse representative, to represent Mrs. Mordowanec and advised Ms. Davidson, the paid union official with responsibility over the local, of this conflict. Ms. Davidson, who knew that Mrs. DeByl-Wowchuk had been asked to represent Mrs. Mordowanec, did not attempt to contact the Hospital with a view to adjourning the meeting, did not attempt to substitute

the afternoon or evening nurse representative for Mrs. DeByl-Wowchuk, did not attempt to rearrange her schedule to be present at the meeting, did not instruct Mrs. Mordowanec not to attend, but rather, suggested to Mrs. Mordowanec that she attempt to have the meeting adjourned and instructed Mrs. DeByl-Wowchuk to appear at the meeting and to take notes but not say anything. Ms. Davidson did not advise Mrs. Mordowanec in advance of the meeting that Mrs. DeByl-Wowchuk had been instructed to take notes only. There was no discussion of the merits of the complaint against Mrs. Mordowanec at the meeting but rather, she was presented with the option of resigning or being terminated, was pressured to resign and in the mistaken belief that she could avoid a hearing before the College if she resigned (a belief she could reasonably have had as a result of what was said to her by the Hospital officials present at the meeting) she signed a letter of resignation. Ms. DeByl-Wowchuk remained silent throughout the meeting and at no time attempted to represent Mrs. Mordowanec. The Hospital subsequently relied upon the letter of resignation signed by Mrs. Mordowanec at the June 9th meeting to successfully challenge the jurisdiction of the arbitration board to consider the merits of the decision to terminate Mrs. Mordowanec.

24. Notwithstanding the conflict of interest which confronted Mrs. DeByl-Wowchuk, we have not been convinced that Mrs. DeByl-Wowchuk was in any way motivated by personal hostility or subjective ill will towards Mrs. Mordowanec. Mrs. DeByl-Wowchuk made certain assessments of Mrs. Mordowanec's work, whether right or wrong, in her capacity as charge nurse, and, as required of a charge nurse in her professional capacity, filed the necessary reports. She recognized the conflict between her duty as a charge nurse and her duty as a union representative and asked to be relieved of her duties as a union representative; hardly the request of an individual harbouring ill will towards the individual she had been asked to represent. In any event, Mrs. DeByl-Wowchuk attended the June 9th meeting only after attempting to have herself replaced and after having been told by a paid union official to restrict herself to taking notes. In these circumstances, her silence cannot be considered as an act of hostility or ill will towards Mrs. Mordowanec. Similarly, there is no evidence that Ms. Davidson was in any way motivated by ill will or hostility towards Mrs. Mordowanec. Indeed, the actions which she took on behalf of Mrs. Mordowanec subsequent to the July 9th meeting belie any hostility on her part.

25. Although the Association was not in any way motivated by ill will or hostility in its representation of Mrs. Mordowanec, we must nevertheless find that it did act in an arbitrary and discriminatory fashion towards her, as proscribed by section 68 of the Act. In simple terms Ms. Davidson, as a paid union official, either did not put her mind to the seriousness of the possible consequences faced by Mrs. Mordowanec or, if she did, responded in a summary and careless fashion in not taking steps to either remove Mrs. Mordowanec from the face to face meeting with management or provide her with the representation to which she was entitled. Instead she directed Mrs. DeByl-Wowchuk, who had admitted a conflict of interest, to attend at the meeting for the purpose of taking notes but to say nothing. The effect of Ms. Davidson's response was to deny Mrs. Mordowanec meaningful union representation at a time when she was entitled and clearly in need of such representation. In the face of the various alternative options that were open to Ms. Davidson and in the absence of any compelling reason for making the decision that she did, we must characterize her conduct as arbitrary within the meaning of section 68 of the Act.

26. In addition, and insofar as Mrs. Mordowanec was arbitrarily denied meaningful representation in circumstances where all employees are entitled to and, *prima facie*, receive union representation, we must find that the Association also discriminated against Mrs. Mor-

dowanec within the meaning of section 68 of the Act. Mrs. Mordowanec did not testify that she would have signed the letter of resignation regardless of who was at the meeting to represent her, as was suggested by the Hospital in its submissions. The issue, however, is not what she might have done if she had the benefit of meaningful union representation in the person of someone who would have advanced her case and counselled and cautioned her with respect to whatever actions she was contemplating (as Ms. Davidson testified that a nurses' representative would have done) but rather, the issue is whether, in the circumstances, the failure of the Association to provide representation at the June 9th meeting, at which Mrs. Mordowanec signed a letter of resignation was in breach of section 68 of the Act. We are satisfied and hereby find that the failure of the Association to provide representation constitutes both arbitrary and discriminatory treatment as proscribed by section 68 of the Act.

27. We are reinforced in our decision in this regard by the decision of the Canada Labour Relations Board in *Re Tom Forester*, [1980] 3 Can. LRBR 491 wherein it was found that "a total lack of representation" in support of employees who, on the advice of the union, had signed letters of resignation in lieu of accepting discharge, constituted a breach of the requirement to represent "fairly and without discrimination" under the *Canada Labour Code*. The Board stated:

We cannot accept as fair representation a total lack of representation whatever its cause . . . (the complainants) received none of the support, advice or advocacy that the serious and critical issue of discharge should receive.

Whereas the union did represent Mrs. Mordowanec after June 9th, it provided no representation at the time she was pressured into signing a letter of resignation that has prevented her from obtaining a hearing on the merits of her termination. We reiterate that in all the circumstances the failure of the union to provide any form of meaningful representation at the June 9th meeting constituted a breach of section 68 of the Act.

28. We now turn to the allegations against the Hospital. In essence it is alleged by the Association and the complainant that the Hospital interfered with the representation of an employee within the meaning of section 64 of the Act. We start by accepting that representation within the meaning of section 64 of the Act includes the representation of employees at the time that formal discipline is imposed and during the processing of any subsequent grievance. Although this Board has never before been required to articulate the extent of the union's right in this regard, it flows naturally from the overriding purpose of the Act; that is, to redress the imbalance that exists when an individual employee is forced to deal with his employer in respect of his employment relations. The United States Supreme Court in upholding an interpretation of section 7 of the *National Labour Relations Act*, which gives employees the statutory right to union assistance in a disciplinary proceeding, observed that sound policy reasons support the finding of an independent right to union representation at such a hearing. (See *J. Weingarten Inc. and Retail Clerks, Local 455*, (1973) 485 F. 2d 1135 84 LRRM 2436 U.S.C.A 5th circuit) *certiorari* granted (1975) 430 U.S. 251 (Sup Ct.) Section 7 of the *National Labour Relations Act* entitles employees "to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection". The U.S. Supreme Court in *Weingarten, supra*, ruled that:

. . . Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates

the inequality the Act was designed to eliminate and has recourse to the safeguards the Act provides to redress the perceived imbalance of economic power between labour and management.

(See also *Chapdelaine v. Emballage Domfar Ltee*, 84 CLLC ¶14,013 (Que. L.C.) for the only Canadian authority on point, in which the Quebec Labour Court held that an employee was entitled to union representation at a disciplinary interview under the “freedom of association” article of the *Quebec Labour Code*).

29. The whole scheme of our Act is to reverse the imbalance that exists between individual employee and employer. The Act provides for the certification of trade unions to act as collective representative for all of those falling within a bargaining unit found to be appropriate for collective bargaining. It is clear on a reading of the Act as a whole that the right to collective representation encompasses not only the negotiation of the collective agreement but the representation of individual employees in pursuit of or in protection of their rights under the collective agreement. It follows that just as under the American and Quebec statutes, which are designed to serve essentially the same purpose, the right to collective representation under the *Labour Relations Act* (embodied in the right accorded to all persons under section 3 of the Act to join a trade union and participate in its lawful activities and the prohibition in section 64 of the Act against interference with the representation of employees by a trade union) extends to include union representation at a meeting called by the employer to charge an employee with misconduct or to impose discipline. While the statute does not give an employee the right to choose his union representative, it does protect the right to representation and prohibits employer interference with this right. It is not for the employer to decide who will be the employee’s representative at a discipline meeting or to put impediments in place that can not be reasonably justified.

30. We make the following findings of fact on the evidence before us with respect to the employer’s conduct vis-a-vis the representation rights of Mrs. Mordowanec at the June 9th disciplinary meeting. We find *firstly*, that at all relevant times the Hospital knew that it would be putting before Mrs. Mordowanec the option of resigning or of being terminated. We find *secondly*, on the basis of the manner in which the meeting was conducted, that the Hospital preferred (for reasons that are self-evident) that Mrs. Mordowanec resign. We find *thirdly*, on the basis of the prior adverse reports filed with the Hospital by Mrs. DeByl-Wowchuk in respect of Mrs. Mordowanec, the request by Mrs. Mordowanec that someone other than Mrs. DeByl-Wowchuk represent her, and the silence of Mrs. DeByl-Wowchuk at the meeting, that the Hospital knew or should have known in advance of the meeting, or, at the very latest, during the meeting, that Mrs. DeByl-Wowchuk was in a conflict of interest vis-a-vis her duty to represent Mrs. Mordowanec and would not be representing her. We find, *fourthly* that, notwithstanding the requests by Mrs. Mordowanec, both before and during the meeting, to put off the meeting or adjourn it so that she could obtain advice, the Hospital refused and insisted that the meeting commence at 10:00 a.m. on June 9th and be carried to a conclusion without adjournment. In the face of these findings of fact and in the absence of any explanation as to why the meeting could not have been put off to allow Mrs. Mordowanec to be properly represented (the Hospital chose to call no evidence), we are compelled to find that the Hospital intentionally exploited its authority over Mrs. Mordowanec to interfere with her right to be represented at the discipline hearing (as provided in the Act and under the collective agreement) and thereby breached section 64 of the Act.

V

31. The Board has a broad remedial authority under section 89(4) of the Act which empowers it to determine what if anything an employer, employers' organization, trade union or person that has acted contrary to this Act shall do or refrain from doing "notwithstanding the provisions of any collective agreement." In this case Mrs. Mordowanec signed a letter of resignation (which was subsequently found by a board of arbitration constituted under a collective agreement to bar its jurisdiction to hear the merits of her discharge grievance), in circumstances where she was entitled to, but was without representation, as a result of a breach of section 68 by her trade union and a breach of section 64 of the Act by her employer. She asks this Board to remedy the breaches of the Act that it has found by directing that her grievance challenging the Hospital's decision to terminate her employment be heard on its merits. The Hospital argues that, regardless of whatever breaches of the Act are established, the Board lacks the remedial authority to do what Mrs. Mordowanec asks it to do. We do not agree.

32. The Palmer Board of Arbitration was not asked to rule, nor did it have the authority to rule, on the legality of the actions of the Hospital and the Association in connection with the resignation of Mrs. Mordowanec. While the Palmer Board found the resignation to be voluntary, its award was made without knowledge that the document upon which it relied was obtained by means of unlawful conduct. In the result the award of that board, which is "final and binding upon the parties" under the provisions deemed to be included in every collective agreement under section 44(2) of the Act, runs headlong into the remedial authority of the Board under section 89(4) of the Act which may operate "notwithstanding the provisions of any collective agreement". As we read these two sections of the Act, the Board has a discretion, although it is not to be lightly exercised, to make a remedial order that overrides the terms of a collective agreement, including the term of a collective agreement that stipulates that the award of a board of arbitration is final and binding.

33. Given the scope of our remedial authority, the nature of the illegal acts committed by both the union and the Hospital and the manner in which these illegal acts have impacted upon Mrs. Mordowanec, the responsible exercise of our remedial authority requires that we provide her with a hearing on the merits of her termination notwithstanding the finding made by the Board of Arbitration constituted to hear the grievance filed by the union on behalf of Mrs. Mordowanec, that it was without jurisdiction to hear the grievance on its merits. Mrs. Mordowanec must be placed in the position she would have been in had it not been for the unlawful conduct of the union and the Hospital and, most certainly, the Hospital ought not to be permitted to harvest the fruits of its illegal conduct.

34. We find judicial support for our remedial approach in *Traugott Construction*, [1981] OLRB Rep. Nov. 1680 affirmed on reconsideration [1982] OLRB Rep. June 958, upheld on judicial review 84 CLLC ¶14,025. In that case a union brought a grievance under section 124 of the Act claiming breach of a collective agreement. The respondent employer argued in defence that the collective agreement under which the grievance was brought had been obtained by the pressure brought to bear by an illegal strike. The Board satisfied itself that the collective agreement had been obtained by an illegal strike and found, therefore, that there was no collective bargaining relationship between the applicant and the respondent, such as would entitle the Board to hear the referral of a grievance under section 124 of the Act. In refusing to reconsider its decision the Board stated:

... the very bargaining rights on which the applicant claimed to have a collective agreement were the result of an unlawful strike which was clearly

intended to avoid the certification proceedings under the *Labour Relations Act*. For the Board to deal with such a grievance would be tantamount to the Board turning a blind eye on violations of the Act which go to the very purpose of the *Labour Relations Act*.

The matter was taken for judicial review. The Court framed the issue before it as follows;

This Court is asked by way of judicial review to strike down the Board's decision and, in effect, to place its own stamp of approval upon a collective agreement obtained by means of an unlawful strike.

After acknowledging the comprehensive nature of the Board's privative clause, the Court found that the Board, in finding that "the piece of paper did not create a legal relationship" as would have allowed it to hear a grievance under section 124 of the Act was not "patently unreasonable" and, therefore, was immune from review. The Court then went on to find in the alternative, after considering the broad scope of the Board's remedial authority under Section 89(4) of the Act that:

If necessary, therefore, we are prepared to look on the Board's refusal to administer the collective agreement by making an award under the arbitration section, 124, as a remedy fashioned to meet the consequences of the illegal act upon which the so called agreement was based.

The Court concluded its judgment by holding that even if its analysis was misconceived it would nevertheless refuse to exercise its discretion to overturn the decision of the Board and thereby allow the complainant union to benefit from its wrongdoing. The Court stated:

One final word on the subject of discretion. In the final analysis, judicial review is a discretionary remedy. In view of the circumstances, if all that I have written above should be held to be misconceived, it would still be my view that our discretion should not be excised in favour of the applicant. No words are more apt than those of Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp. 341, 98 E.R. 1120, as follows:

No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

It is to be observed that the Board followed a similar approach in *Fotomat Canada*, [1980] OLRB Rep. Oct. 1397, [1980] OLRB Rep. Nov. 1643. In that case it was found that the employer's unfair labour practices had prolonged a strike past the six month expiry date for mandatory reinstatement of strikers. The Board refused to allow the employer to rely on the expiration of the six-month period, and thereby benefit from its unlawful conduct, and exercised its remedial authority under section 89(4) of the Act to reinstate the striking employees.

35. The Hospital extracted a letter of resignation from Mrs. Mordowanec by unlawful means (and in circumstances where the union breached its statutory duty of fair representation to her), successfully relied on that letter before an arbitration board that was unaware that it had been obtained by illegal means and now seeks to shield itself from any attempt by this Board to go behind the award of that board of arbitration. Just as the Board and the Court in *Traugott* refused to give any force or effect to a document obtained by illegal means, so also we are not prepared to give any force or effect to the letter of resignation obtained by illegal means or the arbitration award that relied on that letter in refusing to provide Mrs. Mordowanec with a hearing on the merits. Mrs. Mordowanec, a nurse with 27 years of service with the Hospital, is entitled to be put in the position she would have been in had it not been for the breach. We have the authority under section 89(4) of the Act to direct a hearing on the merits and in all the circumstances we hereby exercise our discretion to direct, notwithstanding the time limits in the collective agreement, that Mrs. Mordowanec's grievance with respect to her termination of employment be heard on the merits. The parties are directed to forthwith appoint their respective nominees to the arbitration board and to recommence the arbitration process established under the collective agreement for the purpose of determining if the Hospital had just cause to terminate the employment of Mrs. Mordowanec.

36. The Board will remain seized in the event of any difficulty with the implementation of our remedial order, and in addition, we will remain seized in the event that Mrs. Mordowanec is successful at arbitration and there is some dispute with respect to compensation.

1183-84-U Cameron Douglas Wonch, Complainant, v. International Union of Operating Engineers Local 793, Respondent

Duty of Fair Representation — Unfair Labour Practice — Complaint based on delay in obtaining collective agreement, content of agreement, failure to arbitrate grievance and failure to notify collective agreement — Whether prima facie case established — Whether complainant employed in the bargaining unit — Whether excessive delay

BEFORE: S. A. Tacon, Vice-Chairman.

APPEARANCES: *Cameron Wonch, Terry Davey, John Clark, Moira Wonch and Norma Gillespie for the complainant; Mark Zigler, E. Ford and George Palanuk for the respondent.*

DECISION OF THE BOARD; November 22, 1984

I

1. This is a complaint alleging violation of section 68 of the *Labour Relations Act*.
2. Counsel for the respondent raised three preliminary objections, arguing that the complaint should be dismissed on each of these grounds. The preliminary objections were as follows.
 - (a) The complainant was not a bargaining unit member at the time the

alleged violation of section 68 and such bargaining unit status is an essential prerequisite to a complaint under section 68. The status of the complainant had been determined in a previous Board decision, File No. 0960-83-U; this determination of status was binding on the Board as a finding *in rem* under the doctrine of *res judicata* or, issue estoppel.

- (b) The complaint did not disclose a cause of action. That is, even if the facts alleged in the complaint were true, this did not amount to a violation of section 68.
- (c) The delay in filing this complaint was excessive and prejudicial to the respondent.

The submissions of the respondent on the above points are set out later in this decision.

II

3. In response to the issue of bargaining unit status, the complainant's representatives asserted that the complainant was still a member in good standing of the respondent union, which operated a hiring hall, that the complainant had been a member of the negotiating team in November 1981 and that a grievance had been filed by the respondent union asserting recall rights on behalf of the complainant on July 4, 1983. The grievance was dropped by the respondent union after the first stage reply by the company rejecting the grievance. The respondent does not dispute these facts, nor the fact that the separation slip issued to the complainant in December 1981 indicated date of recall as "unknown". The representatives of the complainant, however, also asserted that the fact that the grievance was filed proved that the respondent union considered the complainant's recall rights were still extant in July 1983 and, further, that Mr. Palanuk, the union business agent, had led the complainant to believe that his recall rights would be protected. The respondent disputes the conclusion and allegation just outlined.

4. The Board must observe at this point that the complainant's representatives simply did not have a very good grasp of the issues in this case or the concept of relevance. Membership in a union is not the same as membership in a particular bargaining unit. Nor, for the purposes of section 68, is membership *in the union* a material consideration. The obligation under section 68 is owed to employees in the bargaining unit whether or not they are union members and, conversely, no section 68 duty is owed to union members who are not also members of a bargaining unit which the union is obligated to fairly represent. Membership on a negotiating team in November 1981 says nothing about an individual's employment status some 14 months later. For example, under the *Employment Standards Act*, an individual indefinitely laid off for more than thirteen weeks is considered to have been terminated, and it is not at all unusual that, even under the more generous terms sometimes found in collective agreements, the rights of former employees to return to work can be ended. A grievance may be filed for a number of reasons; the filing of a grievance does not prove the union believes the grievance would be successful at arbitration. It is simply wrong to assume that an assertion of right undertaken at the instance of the grievor should be construed as an acceptance by the union that the grievor is right in his assertions. The Board, however, has endeavoured to set out the positions and submissions of the complainant's representatives whether or not they addressed the issues.

III

5. With respect to the preliminary objection (b) above, the Board directed the complainant's representatives to state precisely what conduct of the respondent union, in the complainant's view, amounted to a violation of the duty of fair representation in section 68. The following acts or omissions of the respondent union were alleged and said to constitute violations of section 68:

- (i) The union failed to hold a ratification vote as provided in the union constitution. The complainant was, thus, deprived of his right under the constitution to reject the proposed collective agreement or to insist on changes to the negotiated terms.
- (ii) The content of the negotiated collective agreement, in Article 9.09(c), included a provision whereby an employee would lose all seniority (and, thus, recall rights) after a layoff in excess of the employee's seniority with a maximum of twelve (12) months.
- (iii) The union failed to take the complainant's grievance to arbitration. Both parties agreed that the union approached the company on two occasions regarding the grievance and the company's answer was unsatisfactory to the complainant. However, the complainant's representatives alleged, and the respondent disputed, that Mr. Palanuk had assured the complainant that the grievance would proceed to arbitration. The assurances were said to be misleading and illegal.
- (iv) The manner in which the union conducted negotiations, i.e., the length of time taken to conclude the collective agreement, violated section 68. The respondent objected at this point, arguing that since the complaint had not raised the matter of the delay in negotiations, the complainant should not be permitted to do so now.
- (v) The complainant should have been referred to other employment by the union's hiring hall and, further, the union had failed to enforce Article 3.03 of the collective agreement wherein the company is required to give preference to the union for the supply of personnel. The respondent objected that this allegation might come within the scope of section 69 but was clearly not relevant to section 68. The complainant's representatives dropped this issue in reply (see paragraph 22, *infra*). [It should also be noted that it was not disputed the union did refer the complainant to the job with C.A. Pitts in 1982 which the complainant accepted].
- (vi) The complainant's representatives also suggested that the union was not acting properly by not following up on the manner in which the company operated during the 1982 season. However, the complainant's representatives acknowledged that there was no collective agreement in effect during this period. When it was pointed out that, without a collective agreement in force, the company was free to operate in the manner it did during the 1982 season, the complainant's representatives did not pursue this issue further. The Board must again comment that this is but another illustration of the failure of the complainant's

representatives to comprehend the statutory scheme for regulating labour relations in this province.

6. The complainant had filed an earlier complaint against the company, Rapid Ready-Mix Limited, File No. 0960-83-U, alleging that he had been dismissed in December 1981 for union activity. This complaint had been dismissed by the Board in a decision dated September 20, 1983 (hereinafter referred to as the MacDowell decision). The decision involved essentially the same fact situation as the present complaint, although only the company (and not the union) had been named as respondent. It became apparent that the present complaint had been filed in consequence and in the shadow of the earlier unsuccessful complaint against the company. Therefore, the Board directed the complainant's representatives to carefully review that decision and indicate which facts contained therein were agreed to and which were disputed. For those facts disputed, the complainant's representatives were requested to state the facts which they intended to prove. The Board recessed the hearing to permit the complainant's representatives to prepare their response. The respondent did not dispute any of the findings of fact in the MacDowell decision.

7. The complainant's representative indicated the following findings of fact in the MacDowell decision were disputed. (For convenience the Board has set out the "MacDowell finding" first, indicated by quotation marks, and then the complainant's assertions, marked as "C"). Those findings, of course, were based upon the evidence adduced before the Board in the earlier proceeding. That evidence, including the complainant's testimony, was given under oath, subject to cross-examination and weighed in the usual manner.

paragraph 4

"The complainant worked for Algo on occasion in its snow removal business until a back injury made it difficult for him to perform all of the various duties associated with the job."

- c — The complainant worked on snow removal for Algo until the Winter 1982. The complainant did have a back problem and had requested that he not be assigned to operate the backhoe or the loader. The complainant wished to be assigned solely to the dump truck; in the previous winter the complainant had only operated the dump truck.

paragraph 5

"In recent years the company has experienced severe financial difficulties. The economic recession led to a sharp reduction in construction activity — particularly in the north — and there was a consequent reduction in the demand for ready-mix concrete."

- c — The sales for 1982 were the same as for 1983 when there was a full complement of staff.

"The subsidiary was prepared to offer its product at a price well below that of other local ready-mix suppliers . . ."

- c — The other suppliers were not continually undercutting the company, just on two specific projects.

paragraph 6

“The Sault Ste. Marie cement plant was shut down for the winter” [i.e. 1981-82 Winter season]

- c — The company did operate, at least briefly, during this period.

paragraph 7

“Gerald Hill testified that in view of the competition and the slack demand for concrete, it was uneconomic to keep the plant open over the winter months.”

- c — The plant was open, the General Manager was kept on and paid his salary.

“Although the company had never had a total shutdown before, business conditions simply did not warrant incurring the high fuel costs associated with a winter operation.”

- c — The furnace at the plant was kept going for at least part of the time.

“... because of Mr. Wonch’s back injury, and the complaints which he had voiced in the past, he was not offered a job with Algo.”

- c — see comments re: back injury above.

“He [the complainant] remained working for that company until December, 1982.”

- c — The complainant worked for Pitts until November, 1982, not December.

paragraph 8

- c — The facts as set out are not disputed; the complainant, though, did not receive a registered letter from the company stating that he was terminated.

paragraph 9

“According to Gerald Hill, the Sault Ste. Marie cement plant remained inactive until the Spring of 1982.”

- c — see reference to plant opening during Winter 1981-82, above.

“The company’s manpower needs in Sault Ste. Marie were minimal, and it was determined that only one additional employee was needed.”

c — More than one employee was needed.

paragraph 10

“... was told that Lahtie was working in Sudbury.”

c — Lahtie visited but never worked in Sudbury.

“... Haskett was only kept on for a couple of weeks and returned to his alternative job at Stone and Webster.”

c — Haskett only worked 2 days and did not return to Stone and Webster.

“... a temporary employee was retained for about three months during the peak summer months.”

c — This is not disputed except that the employee earned \$7,000 during this period.

paragraph 11

“and, out of interest, attended one negotiating meeting;”

c — The complainant did not attend out of interest but was asked to attend by the union representative. [The complainant did not dispute the finding that he had attended only one negotiating meeting.]

paragraph 12

“George Palanuk, the local union business representative, testified that there was only one or two employees potentially bound by the agreement and he discussed its contents with them before it was signed.

c — The recollection of the complainant’s representatives was that Mr. Palanuk testified that he “thought” he’d discussed it with one individual.

paragraph 14

c — With respect to the first three sentences, the complainant’s representatives stated that the complainant had clarified his testimony, i.e., that upon reflection he told the Board that he had only seen the truck once.

“Gerald Hill and Ken Trudeau both testified that, to the best of their

recollection, the construction site in question was closed because of inclement weather between January and April, 1982 and no vehicles had been sent.”

- c — This referred to the Crystal Heights project which was not completely closed down for the entire period.

“This evidence was confirmed by the general contractor, who testified that construction stopped completely after an unusually large snowfall on January 3, 1982, and did not resume until mid-April.”

- c — The general contractor was lying. [The Board informed the complainant’s representatives that this was not the forum to deal with any allegations of perjury against the general contractor.]

paragraph 15

“The complainant did not express any wish to return to his former job . . .” [October 1982].

- c — The complainant did ask how things were going for the company. The complainant’s representatives asserted that this implied that the complainant was asking when he would get his job back.

paragraph 16

“... Trudeau testified that he [the complainant] did not specifically ask for his old job back.” [June 1983]

- c — The complainant did ask for his job back.

paragraph 17

- c — With respect to the testimony that Mr. Palanuk was aware the company was not paying the collective agreement rates and took no action, the complainant asserted this proved the union and the company had a sweetheart arrangement. The Board stated that this was “argument” not “fact” and the complainant’s representatives did not deal further with this.

8. At this point, the Board directed the complainant’s representatives to stipulate all the facts they intended to place before the Board. Witnesses were excluded at the request of the complainant’s representatives. The Board notes that the complainant’s representatives determined that the complainant himself should leave the room as well. The complainant’s representatives indicated later in the hearing during submissions that they wished the witnesses to remain excluded; the Board ruled that the order for exclusion would continue.

9. The following is a summary of those facts: (in addition to those set out in paragraph 7 above, i.e., re: The MacDowell decision):

- (a) Mr. Wonch approached Mr. Palanuk approximately twice a month from February, 1982 to December, 1982, to ask when a collective agreement would be signed and when he would be recalled.
- (b) Mr. Palanuk told Mr. Wonch on several occasions that when a collective agreement was signed Mr. Wonch would return to the company with his seniority; on other occasions, Mr. Palanuk replied that "he was working on it."
- (c) Mr. Wonch requested, by registered letter to Mr. Palanuk, copies of minutes ratifying the collective agreement (see Exhibit 4). Mr. Palanuk did not reply himself although the union office in Toronto did; the reply was not satisfactory to the complainant.
- (d) Mr. Wonch sent another letter to Mr. Palanuk, dated March 21, 1983 (Exhibit 5); there was no reply to that letter.
- (e) The complainant's representatives expected Mr. Palanuk (who would be appearing under subpoena) to confirm Mr. Wonch's testimony, including setting out Mr. Wonch's employment history at Ready-Mix.

The Board read back the above summary to the complainant's representatives who confirmed that the summary accurately reflected what had been stated and, further, this represented all the facts they intended to prove.

10. Mr. Davey strenuously objected to the Board proceeding in this manner. Mr. Davey submitted that he had appeared in numerous Board hearings and had never encountered such a manner of proceeding. He further objected to being forced to reveal the questions he intended to ask Mr. Palanuk and suggested that this procedure raised the spectre of collusion between counsel for the respondent and Mr. Palanuk with respect to preparation of responses by the intended witness.

11. The Board replied as follows:

- (a) The Board had not forced the complainant's representatives to state the questions intended to be asked of Mr. Palanuk. The Board had merely asked what *facts* were to be proved through Mr. Palanuk. When the complainant's representative proceeded to state the questions to be asked, the Board interrupted to avoid a recitation of the questions and asked whether it was fair to characterize Mr. Palanuk's testimony as expected to confirm Mr. Wonch's testimony. The complainant's representative agreed but, nonetheless, continued to recite the intended questions. [It should also be noted that the complainant's representatives chose to state which facts would be proved through which witness rather than just summarizing the material facts they intended to prove and on which they relied. Unfortunately, the complainant's representatives were unclear about the concept of relevance, about what 'facts' were actually relevant to the matter in issue].
- (b) The Board stated that collusion was a serious allegation. The Board

assumes that parties abide by the Board's rulings regarding the exclusion of witnesses and the limits thereby placed on any discussions with those witnesses. The Board was not prepared to allow such allegations of serious misconduct to be casually raised.

- (c) The Board also informed the complainant's representative that the Board was utilizing a reasonably common procedure whereby the complainant was being asked to state his best case, i.e., to stipulate all the facts which were to be proved and, then, assuming all those facts were true, to demonstrate how a violation of section 68 would thereby be made out.

IV

12. The Board then directed the complainant's representatives to:

- (i) assume the facts they intended to prove were true and demonstrate how a violation of section 68 was thereby made out;
- (i) show how, even assuming there was a violation of section 68, that the remedy sought flowed from that violation and should be granted particularly given the considerable passage of time; and
- (iii) respond to the respondent's submission seeking dismissal on the ground of undue delay in filing the section 68 complaint.

13. The submissions of the complainant's representatives are summarized under the headings *prima facie* case [re: paragraph 11(i)], remedy [paragraph 11(ii)] and timeliness [paragraph 11 (iii)]. As to the respondent's assertion that the complainant was not a member of the bargaining unit at the time of the alleged violation of section 68 and, hence, had no status to bring this complaint, the complainant's representatives simply stated that the complainant continued to be a union member in good standing and would have been recalled had the union not agreed to the provision in the collective agreement terminating seniority rights after a specified period. It was asserted that this was sufficient to make the complainant an "employee in the bargaining unit" even though he had not actually been at work for some time, had been employed elsewhere, had no right of recall at the time he ceased working for the employer and, as it turned out, had no right of recall in accordance with the collective agreement subsequently concluded.

14. Apart from the comments in paragraph 3, the Board would emphasize that "seniority" and "recall rights" as used throughout do not refer to rights held by the complainant under one collective agreement which were "lost" or "weakened" through some action of the union. In this case, the union was negotiating a *first* collective agreement. The complainant had *no* recall rights or seniority. What he is really complaining about is that the first collective agreement did not *create* such rights for him because he had had no employment relationship with the company from December 1981 to January 1983 (the date the first agreement was effective, although it was signed in April 1983). His argument is that in early 1983, the union should have demanded terms which would have been helpful to him even though he had ceased working for the employer over a year before. And, of course, one can only speculate about the employer's response to this demand.

15. *Prima facie case:* The complainant's representatives submitted it was bad faith for the union not to give Mr. Wonch notice that the collective agreement was to be ratified without his input since he was a card-carrying member of the union. It was arbitrary and in bad faith for the union to ratify a collective agreement in a manner which, it was said, violated the union's constitution and/or bylaws. It was in bad faith for Mr. Palanuk to have led Mr. Wonch to believe that, when a collective agreement was negotiated, he (Mr. Wonch) would be recalled by the company. Mr. Wonch expected that the recall provisions in the initial proposals by the union to the company would be incorporated into the eventual collective agreement (and, presumably, for the union to have agreed to the clause terminating seniority rights after a specified period on layoff was in bad faith). The union misrepresented Mr. Wonch by taking his union dues but not fulfilling their part by not faithfully checking that its members were in fact being treated fairly and enforcing the "preference for union personnel" clause in the collective agreement with the company. [As noted in paragraph 5(v), this last argument was dropped]. The Board also repeats the fact that the union did refer the complainant to another job and collected dues because he was gainfully employed on that job. There is no suggestion that, while employed at Pitts the complainant ever evinced any desire to continue to be treated as an employee of Rapid Ready — Mix.

16. *Remedy:* The complainant's representatives initially asked for relief in the form of full monetary compensation for all lost wages from layoff in December 1981 to date, less monies received from other earnings, UIC, etc. After some discussion amongst the complainant's representatives, the requested relief was changed to full compensation for all lost wages from January 1983, i.e., the date on which the collective agreement was effective, to date, again, less any monies received from the earnings, UIC, etc. It was argued that had the clause terminating recall rights not been (improperly) included in the collective agreement, the complainant would have been recalled at that date. Needless to say, there is not the slightest suggestion that, had the agreement been entirely silent *vis a vis* recall, the complainant would ever have been recalled. The MacDowell decision suggested the contrary.

17. *Timeliness:* (a) Although not directly related to the timeliness issue, the complainant's representatives submitted that the union should have insisted on an addendum to the collective agreement providing that the provision terminating recall rights would not take effect until any or all the laid-off union members had been given an opportunity to respond to a *bona fide* recall, regardless of the length of the recall period offered. Again, this reveals a singular lack of awareness of the bargaining process. The complainant's representatives are attacking the union for negotiating a collective agreement which did not suit the complainant. There seems to be an assumption that the union simply had to ask for certain terms or was under an obligation to ask for certain terms and the company would have automatically agreed. In fact, the union had negotiated in particularly difficult circumstances.

(b) With respect to timeliness, Mrs. Wonch testified as follows:

- (i) While researching his case against the company in July and August 1983, the complainant discovered that (in the complainant's view) the union had not represented him in a fair manner (i.e., by not holding a ratification vote accepting the collective agreement). The complainant had not given this discovery much weight until about six days before the September 1983 hearing. The Board had advised the complainant to add the union's name under paragraph 3(a) of his complaint against

the company [i.e., name of any other person, etc. who may be affected by the complaint].

- (ii) Mrs. Wonch also stated that she had a conversation with Mr. Palanuk on July 27, 1983 in the presence of a Mr. Grandbois, a business agent for another union. Mr. Palanuk allegedly asked Mrs. Wonch why the union's name appeared in paragraph 3(a) of the complaint against the company. Mrs. Wonch replied that the Board had suggested this. Mr. Grandbois stated that the complainant was opening up the complaint to a [now] section [68] complaint.
- (iii) Three or four days prior to the MacDowell hearing on September 7, 1983, Mrs. Wonch learned through a brief conversation with a lawyer that the union should have been joined in the proceeding. Mrs. Wonch replied that they were not complaining against the union, just the company. Mrs. Wonch spoke with Mr. Davey shortly before the hearing as well but only with respect to issuing subpoenas.
- (iv) Mrs. Wonch represented the complainant at the September hearing. She was informed by the Board that, to appear before the Board, no legal counsel was required. Mr. Davey attended the September 7th hearing as a member of the public; he took no part in the proceeding.
- (v) The complainant sought legal aid with respect to filing this complaint but was refused. Mrs. Wonch had numerous contacts with the Board from September 1983 to November 1983 enquiring about proper procedures for filing this complaint. As she was working full-time, these contacts took some time; Mr. Wonch, however, was not employed during this period.
- (vi) The complainant then requested assistance from Mr. Clark and Mr. Davey. These two individuals met with The Honourable Russell H. Ramsay in January or February 1984 to see if anything could be done; Mr. Ramsay had not replied to date.
- (vii) Mr. Clark and Mr. Davey were then asked to represent the complainant. The letters to the union (Exhibits 5 and 6) were sent.
- (viii) The complainant's representatives attempted to put together the complaint in April but, with the three representatives all employed full-time and none being legally trained, the steps took longer. Moreover, the involvement of the representatives in community activities further lengthened the delay. In fact, the complaint, dated July 30, 1984, was received by the Board on August 7, 1984. Mrs. Wonch acknowledged that during the previous year, or at least from September 1983 to July 30, 1984, the complainant had never put the union on notice, nor given any indication, that a complaint under section 68 was to be filed.

V

18. The respondent's submissions are organized according to the three grounds for dismissal originally raised: the complainant was not a bargaining unit member at the time of the alleged violation of section 68 and, thus, the complainant had no status to bring this complaint (hereinafter referred to as status); the complaint did not disclose a cause of action (referred to as *prima facie* case); the delay in filing the complaint was excessive and prejudicial to the union (referred to as timeliness).

19. *Status*: The respondent contended that the rights under section 68 are accorded only to "employees in the bargaining unit" and such status at the time of the alleged violation of the duty imposed by section 68 is critical (see *Canadian Union of Public Employees*, [1974] OLRB Rep. Mar. 176 (at paragraphs 2,3); *Bricklayers, Masons Independent Union of Canada, Local*, [1979] OLRB Rep. Apr. 278; *Lawrence Aluminium Incorporated*, [1975] OLRB Rep. Nov. 885 (at paragraph 12); *Frank Manoni*, [1981] OLRB Rep. Dec. 1775 (at paragraphs 10, 11, 14, 18); *Keith McLeod Sutherland*, [1983] OLRB Rep. July 1219; *Blue Line Taxi Company Limited*, [1983] OLRB Rep. Feb. 192.) Here, the complaint arose after the complainant had ceased to be an employee in the bargaining unit or even to have recall or re-employment rights in the bargaining unit. The complainant was laid-off by Rapid Ready-Mix for economic reasons in December 1981. In the interim he worked for another company (Pitts) for ten months. Rapid Ready-Mix had no legal obligation to hire him back — at least before the collective agreement was signed. And, as noted, when the collective agreement was signed, the complainant had no recall rights under that agreement. In the MacDowell decision, (paragraph 8) the complainant was found to have been effectively terminated in December 1981 rather than laid-off. The respondent argued that this was a finding as to status, adverse to the complainant, and binding on the complainant. The judicial doctrine of *res judicata* was developed to avoid an abuse of process in relitigating issues which had already been determined. It was argued that both issue estoppel and findings "*in rem*" were aspects of the doctrine of *res judicata*; moreover, a finding *in rem* is binding even if the parties are not the same as in the original proceeding. The Board clearly has the authority to apply the doctrine of *res judicata* (*Re Tandy Electronics Ltd. and United Steelworkers of America et al.*, (1979) 26 O.R. (2d) 68 (Div. Ct.); *Napev Construction Limited*, [1980] OLRB Rep. June 862; *Fanshawe College of Applied Arts & Technology*, [1981] OLRB Rep. Sept. 1225). In particular, the respondent referred to the Board's decision in *Canadian General Electric Company Limited*, [1978] OLRB Rep. Apr. 384 regarding the effect of an earlier Board decision on managerial status in a subsequent proceeding. In addition, courts have an inherent jurisdiction to dismiss for abuse of process even where the elements of *res judicata* are not strictly made out and has used this jurisdiction to prevent relitigation of the same issue even where the parties were not identical (*Nigro v. Agnes Surpass Shoe Stores Ltd. et al*; *Cummer-Yonge Investments Ltd.*, (third party) *Shankman et al. v. Agnes-Surpass Shoe Stores Ltd. et. al.*; *Cummer-Yonge Investments Ltd.* (thirty party) (1977), 3 C.P.C. 194 (Ontario High Court); *Bank of Montreal v. Crosson et.al.* (1979), 11 C.P.C. 30 (Ontario High Court)). Although the Board does not possess comparable inherent jurisdiction, the Board does control its own procedure under section 102(13) of the Act. The respondent urged the Board, even if *res judicata* did not strictly apply, to refuse to relitigate the same fact situation, to accept the finding in the MacDowell decision that the complainant had no status as an employee in the bargaining unit at the time of the alleged contravention and, hence, dismiss the complaint.

20. *Prima facie case*: The respondent submitted that the essence of the complainant's allegations was that the union should not have negotiated a provision in the collective agreement terminating recall rights after a specified period and/or should have submitted the collective agreement for ratification by "former" employees. Firstly, the clause regarding recall rights

was a standard provision in many collective agreements and there was no suggestion that there was any subjective ill-will directed against the complainant. The inclusion of the clause reflected the relatively poor bargaining position of the union and nothing more. Secondly, to have delayed in negotiating the Sault Ste. Marie collective agreement while there were no employees in the bargaining unit was not unreasonable; the union had kept its bargaining rights alive and, in fact, resisted a termination application. Thirdly, the union's decision not to go back to the former employees to ratify the collective agreement was sensible; to have done otherwise would have been an academic exercise, as described in the MacDowell decision (paragraph 12). However, even if this action violated the union's constitution that was not, in itself, a contravention of section 68 (*Frank Manoni, supra*). In short, none of these allegations, even if proved, constituted a violation of section 68. With respect to the complainant's grievance, the union's decision not to proceed to arbitration was unimpeachable given that the complainant had no seniority under the collective agreement and, hence, the grievance was certain to fail at arbitration. [It is not necessary to recount the respondent's position regarding the alleged non-enforcement of Article 3.03 and the operation of the hiring hall given that a representative of the complainant conceded that these matters were not properly before this Board; see paragraph 24 below.]

21. *Timeliness:* The respondent submitted that the delay was unreasonable and prejudicial. The complainant was aware in about July 1983 of the potential claim against the union. Legal advice shortly before the September 7, 1983 hearing confirmed that the union should have been joined. Yet the complainant gave no indication that a section 68 complaint would be forthcoming until some thirteen months after he was aware of a potential claim. The two requests for information in early 1984 did not amount to notice to the union. Moreover, the previous complaint against the employer had raised many of the same factual issues, and, indeed, having come through a Board hearing, the complainant could not be described as being totally unaware of the Board's existence and its procedures. The prejudice to the union flowed from the lengthy passage of time (and concomitant fading memories) especially since some of the events at issue occurred as far back as 1981. Without reasonable excuse for the delay the complaint should be dismissed. Cases referred to in support generally include: *CCH Canadian Limited*, [1977] OLRB Rep. June 351 (at paragraph 3); *Luciano D'Alessandro*, [1983] OLRB Rep. Oct. 1699 (paragraph 16); *Conestoga College of Applied Arts & Technology*, [1983] OLRB Rep. June 882. Further, it was argued that the complainant, having lost against the company, was really "switching targets" and this should not be permitted: *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417 (paragraph 59). In any event, since the delay in filing the section 68 complaint essentially covered the period of damages (i.e., for lost wages from January, 1983 when the collective agreement was signed) and the Board usually refuses to award damages for the period of delay, there would be no useful purpose in hearing the merits in this case; *D'Alessandro, supra*. Finally, from a labour relations perspective, it would be inappropriate to resurrect matters potentially affecting other employees at this late date; *Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420 (paragraph 20 and 22); *Sheller-Globe*, [1982] OLRB Rep. Jan. 113 (paragraph 13).

VI

22. In reply, each of the complainant's representatives had some final comments. Mr. Davey reiterated his earlier submission that Mr. Palanuk had either been deceiving Mr. Wonch about the recall rights or the union had violated section 68 by not holding a ratification vote, i.e., by not giving Mr. Wonch the opportunity to reject the collective agreement. It was asserted that Mr. Palanuk had acted in an arbitrary fashion by agreeing to a term in a collective agreement which he must have known would harm some members who had been on layoff for a considerable time. Further, the fact the Mr. Palanuk had initially filed a grievance in June

1983 was proof that Mr. Palanuk thought Mr. Wonch had recall rights and was merely laid off. With respect to the delay, Mr. Davey submitted that some delay was attributable to the fact that it was difficult to have ready access to the Board, given its location in Toronto. He suggested that perhaps some information given by articling students was not accurate, thus, increasing the delay (no further details were provided on this point). Finally, Mr. Wonch had sought further information from the union and, when this was not forthcoming, he filed a complaint with the Board. Mr. Davey also suggested that there were additional facts to be introduced before the Board. The Board reminded Mr. Davey that the complainant's representatives had been given a full opportunity to state all the facts which they intended to prove, that the Board had asked several times if all the facts were set out and that the complainant's representatives had replied in the affirmative. Mr. Davey then conceded that the facts had been summarized but he expected the witnesses to give their testimony in greater depth.

23. Mr. Clark, the second representative of the complainant, essentially submitted that it was a violation of section 68 for the union to accept clauses in a collective agreement which would eliminate recall rights of laid-off employees whom the union had previously encouraged to support the union in its certification application. If the union was permitted to do this, it would be a dangerous precedent for the entire labour movement since it would permit an employer to layoff employees post-certification and then include clauses in a collective agreement which deprived employees of recall rights. In this case, the initial union proposals had not included a clause eliminating recall rights after a specified period of time and the collective agreement was based on the union's proposals. Mr. Clark did not address the fact that, despite his expressed concerns, it is not at all unusual for a collective agreement to provide that employees on indefinite layoff, after a time, no longer have recall rights.

24. Mrs. Wonch, the complainant's third representative, basically argued that if the union had signed a collective agreement with Rapid Ready-Mix at Sault Ste. Marie at the same time as the Sowerby collective agreement was signed, i.e., December 22, 1981, the employees' rights at Sault Ste. Marie would have been protected. She conceded that she was not asserting that the union had deliberately delayed the negotiation of the Sault Ste. Marie collective agreement so as to ensure that the recall provision would operate to eliminate Mr. Wonch's recall rights. Mrs. Wonch reiterated that Employment Standards legislation required that a registered letter be sent in order to terminate, rather than layoff, an employee. She also reiterated the argument that the union should have gone back to the employees on lay-off to ratify the collective agreement; that would not have been an "academic exercise" but would have given the employees input. Finally, Mrs. Wonch agreed that the complaint had not been filed under section 69 and, consequently, there was no basis for an argument that the union had not sought to enforce Article 3.03 of the collective agreement.

VII

25. The Board has set out the proceedings and the submissions of the complainant's representatives in considerable detail because the complainant was not represented by legal counsel. That, in itself, is not uncommon in section 68 complaints. The Board has considerable experience in explaining its procedures to lay persons who appear before it, lest there be a denial of natural justice. However, the Board must be careful lest a concern for the complainant who is unsophisticated and unrepresented (by counsel) prejudice the rights of a respondent who must appear and defend against what might be uninformed and ill-founded allegations.

26. In this case, the complainant had three representatives, Mrs. Wonch (the complainant's wife), Mr. Davey and Mr. Clark. The Board permitted all three representatives to address

the various issues as they saw them. Indeed, the Board permitted the representatives to elaborate on — but not to contradict — each other's submissions. This rule, in fact, had to be enforced on several occasions where one representative would begin by repudiating what had just been urged upon the Board by another representative. At these points, the Board stopped the proceedings until the complainant's representatives agreed amongst themselves as to precisely what they were arguing before the Board.

27. The Board also took considerable time to explain its procedure, especially with respect to the direction to stipulate all the facts which the complainant's representatives intended to lead and to make various submissions on the assumption those facts were true. The reason for this manner of proceeding is straight forward. Proceedings before this Board are not without costs in terms of monies spent and the time involved for both the parties and the Board itself. Where there seems to be a question as to whether there is a *prima facie* case, it is sensible to require the complainant to state the facts which he intends to prove. If, even assuming those facts were true, there is no violation of the Act, the Board may dismiss the complaint without hearing the testimony by which the complainant intends to prove those facts. This avoids a lengthy, costly and ultimately pointless hearing. It is a procedure which makes sense and has regularly been employed. Indeed, the rules even contemplate that the Board may dismiss a case without any hearing whatsoever if the complaint does not disclose a *prima facie* case.

28. Mr. Davey, in particular, repeatedly stated that he had appeared in numerous Board proceedings (and presumably would be more knowledgeable than a typical lay person). But, he did not seem to comprehend the Board's directions on this manner of proceeding despite repeated explanations and reminders. The Board again must comment that the complainant's representatives generally did not demonstrate a basic grasp of the issues, of the legal and statutory framework within which the complainant's rights would be and must be determined. The relationship of the duty under section 68 and the submissions of the complainant's representatives was often tangential at best. Nonetheless, the complainant's representatives were given full opportunity to set out the facts they intended to prove and their submissions.

VIII

29. The complainant objects to the manner in which the collective agreement was negotiated, the content of that agreement (specifically, the provision regarding recall rights) and the failure to have the agreement ratified by former/laid-off employees. Even if these matters, as alleged, were true, the Board does not consider these complaints amount to a violation of section 68.

30. Section 68 reads:

68. A trade union or council of trade union so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

31. The Board sees nothing contrary to section 68 in the union's decision to accede to the company's demand to postpone negotiations at the Sault Ste. Marie plant until the Sowerby agreement was negotiated (see *Rapid Ready-Mix Limited*, [1982] OLRB Rep. Sept. 1348.) Nor, was there anything contrary to the duty of fair representation in suspending negotiations

until the Sault Ste. Marie plant was in a position to operate with bargaining unit employees. As the MacDowell decision states, “. . . we do not draw any adverse inference from the length of time taken to negotiate a collective agreement in respect of a plant at a facility which was shut down for substantial periods of time and, even when operating, was working at a substantially reduced scale in a volatile and uncertain business climate . . .” (at paragraph 12). It should be added that, during this period, the union maintained its bargaining rights and successfully defended against a company application to terminate bargaining rights. The pace of negotiations, and indeed the content of the collective agreement ultimately signed, also reflected the union’s relatively weak bargaining position.

32. Because the content of a collective agreement is determined by a number of factors, but overwhelmingly by the economic clout of the respective parties, the Board has generally refused to pass judgement on the content of a collective agreement in section 68 complaints. The Board will intervene, however, if the provisions discriminate amongst employees without rational reason or if motivated by personal animosity. As set out in *Douglas Aircraft Company of Canada Ltd.*, [1976] OLRB Rep. Dec. 779 at 789:

To summarize the position of the Board, therefore, we suggest that “discriminatory” in section 60 [now 68] is designed to prevent distinctions in treatment accorded individual employees or groups of employees which are made without the support of cogent labour relations reasons. The focus of the concern is the distinction itself rather than on the motive for the distinction. Thus a distinction made without motive may be discriminatory if it lacks the underpinning of reasonableness defined from a labour relations point of view. By the same token a seemingly reasonable distinction may become discriminatory if it is motivated by hostility.

See also *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35; *The Algoma Steel Corporation, Limited*, [1981] OLRB Rep. June 611; *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014; *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781.

33. In the instant case, it was conceded there was no personal animosity. More importantly, the provision regarding recall rights is not uncommon in collective agreements. It is difficult to assert that a relatively common provision in collective agreements is not supported by cogent labour relations reasons. Nor did the complainant’s representatives assert there were no such cogent labour relations reasons. There was no suggestion that the union, in acceding to such a clause — for it was not in the initial proposals of the union (according to the complainant’s representatives) — was acting for reasons other than to secure the best possible collective agreement in what were undoubtedly difficult circumstances. Even assuming, as the complainant submitted, that Mr. Palanuk was assuring the complainant as late as December 1982 that the union was negotiating a collective agreement which would protect the complainant’s seniority for recall, this cannot be read forward in time so as to taint the union’s acceptance in 1983 of a collective agreement with a provision eliminating recall rights after a specified period of lay-off. Such an extension of the duty of fair representation would hamstring negotiations and would fly in the face of the realities of collective bargaining. Again, as stated in paragraph 14, the union was negotiating a *first* collective agreement. The complainant had no recall rights or seniority except in so far as that first collective agreement created such rights. To reiterate the point, that the collective agreement did not create recall rights for persons who had no employment relationship with the company for over twelve months is not, of itself, a violation of section 68.

34. The alleged failure to hold a ratification vote must next be examined. This Board adopts the remarks in the MacDowell decision, at paragraph 12:

“... Nor is it particularly surprising that there was no ratification vote, even if the union’s constitution requires it. George Palanuk, the local union business representative, testified that there were only one or two employees potentially bound by the agreement and he discussed its contents with them before it was signed. A ratification vote would have been more than a little academic ...”

[The Board notes that the disagreement by the complainant’s representatives with the facts on this aspect of the MacDowell decision (see paragraph 6, *supra*) is so minor as to be ignored]. Furthermore, the Board does not act as a watchdog or enforcer of internal union affairs which do not also involve a violation of other sections of the Act. The Board affirms this position, as stated in *Frank Manoni, supra*, and cases cited therein, including *Mario Moreira*, [1980] OLRB Rep. July 1039; *A. J. Roberts*, [1974] OLRB Rep. March 169. In this case, since the right to a ratification vote is founded, if at all, in a union’s constitution or bylaws and not in the *Labour Relations Act*, and violation of other sections of the Act was not alleged, the Board is not prepared to characterize the alleged failure to hold a ratification vote as a contravention of section 68. This Board agrees with the earlier Board’s conclusion that a ratification vote would have been academic, and the decision not to engage in an academic exercise is not arbitrary, discriminatory or in bad faith.

35. As well, the Board does not regard the union’s decision not to proceed to arbitration with the complainant’s grievance (filed in July 1983) as contrary to the duty of fair representation. The filing of the grievance is not proof that the union regarded the complainant as merely being on lay-off and not terminated. Rather, the union was attempting to assist the complainant in getting back his job. The filing of a grievance, like the issuance of a writ, may produce advantages for the griever/plaintiff, regardless of the merit of the claim. However, once the internal grievance process is finished, a union is faced with incurring substantial costs at arbitration. A union may properly refuse to take that step provided the union has “turned its mind” to the grievance. A useful elaboration of the duty of fair representation is found in *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143 [the Gormley case], at paragraph 18:

Over the years many aspects of the duty of fair representation have settled into place. The Board has repeatedly held that in order not to act in an arbitrary manner in the processing of a grievance, the union must direct its mind to the merits of the grievance and act on the available evidence. While the effective operation of the grievance machinery requires that unions also be allowed to consider factors beyond the merits of a particular grievance in deciding whether to process a grievance on to arbitration, considerations of this nature must have their roots in the welfare of the bargaining unit and the bargaining process and must not be based on irrelevant facts or principles. Additionally, a union is prohibited from processing a grievance in bad faith. An employee must not become the victim of the union’s ill will such that a dislike for an individual dictates the path of the grievance rather than the merits of the grievance or legitimate concerns for the welfare of the bargaining unit and bargaining process. The prohibition against a union acting in a manner that is discriminatory func-

tions to prevent a union from distinguishing among members in the bargaining unit unless there are good reasons for so doing. To avoid acting in a manner that is discriminatory, the duty requires, in general, that like situations be treated in a like manner and that neither particular favour nor disfavour befall any individual apart from the others unless justified by the circumstances. The duty does not make the union the guarantor for every aggrieved employee. Instead, the duty requires that the union consider the position of all of its members and that it weigh the competing interests of minorities or individuals in arriving at its decision.

36. In the instant case, the complainant's representatives did not really press the issue of the handling of the grievance. Counsel for the respondent stated the union did not proceed to arbitration because they knew the grievance could not succeed and the complainant's representatives did not dispute this, except to assert that the filing of the grievance proved the union thought there were recall rights. The Board has already commented on this error in reasoning. The Board finds it was at least reasonable (and probably correct) for the union to conclude that the grievance would have failed at arbitration because of the collective agreement clause under which the complainant's recall rights were terminated. Moreover, it is conceded by the complainant's representatives that there was no personal animosity or ill-will directed toward the complainant by the union's officials. Thus, the complainant's assertion that section 68 was violated in the union's decision not to proceed to arbitration must fail.

IX

37. In the alternative, in the circumstances of this case, the Board would be disposed to exercise its discretion under the *Labour Relations Act* to decline to inquire into the complaint because of the considerable delay involved. The Board described its approach to delay in filing section 68 complaints in *The Corporation of the City of Mississauga, supra*:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it — including the employees — are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited*, [1966] 18 L.A.C. (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay — holding, in most cases, that it will simply take this matter

into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship — quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: the length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involved retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

[See also: *Sheller-Globe Canada Limited*, *supra*, where the Ontario Divisional Court in a unanimous judgement dated June 28, 1983 declined to judicially review the Board's dismissal of a complaint after entertaining evidence and submissions with respect to the delay in filing and without an inquiry into the merits].

38. In the instant case, the complainant was aware of a possible claim against the union as early as July or August 1983. While it might have been understandable for the complainant to have awaited the outcome of the Board hearing concerning the complainant's action against the company, there was no credible reason for the considerable delay from September 1983 (when the MacDowell decision issued) until August 1984. The union had no notice of an impending section 68 claim; the usual problems of fading recollections, etc., are compounded by this lack of notice. The letters requesting information (Exhibits 4, 5) do not constitute notice. What is even more prejudicial is the fact that some of the events underlying the claim date back to December 1981. The only reasons offered for the delay from September 1983 to August 1984 were that the complainant's representatives (although not the complainant) were employed full-time during this period, were lay persons and were involved with other activities as well. The requirement that communications with the Board be by telephone or letter, given the location of the Board's offices, was also cited.

39. The Board simply does not accept these reasons as sufficient excuse for the length of the delay. The complainant was not naive as to Board procedures. The complainant had been through one proceeding and should have known that allegations of impropriety must be proved. To file an unfair labour practice complaint against the union is no more difficult than to file a complaint against a company and, as stated, the complainant had previously filed a complaint against his former employer. The complainant may have selected representatives who had too many other commitments or were not particularly knowledgeable. But the consequences of these choices must be borne by the complainant, not the union.

40. As stated in *Sheller-Globe, supra*, at paragraph 13, "... the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time ...". The parties to a collective agreement are entitled to continue an ongoing relationship in response to changing circumstances without having the spectre of matters far in the past being resurrected, matters which could well threaten labour relations stability by seeking to disentangle an intricate relationship to ascertain rights at a much earlier point in time. In many instances, it will not be possible to respond to violations of rights in the past without wreaking havoc on the rights and expectations of others legitimately and reasonably generated through the continued collective bargaining relationship. It is the concern with strengthening, not undermining, the collective bargaining relationship which leads the Board to require compelling labour relations reasons to go back so far in time. Here the havoc could well be considerable given that other employees in the bargaining unit have been hired, have accumulated seniority, etc. The Board considers there are no such compelling labour relations reasons for undertaking such an exercise in the present case.

X

41. Finally, the Board would dismiss the complaint on the ground that the complainant was not an employee in the bargaining unit at the time of the alleged contravention of the duty of fair representation, i.e. in January 1983 (the date the collective agreement was effective). The Board relies on the cases cited by the respondent in paragraph 19, above, wherein status as an employee in a bargaining unit where the respondent hold bargaining rights is critical (i.e., *Canadian Union of Public Employees; Bricklayers; Lawrence Aluminium; Frank Manoni; Blue Line Taxi; Keith MacLeod Sutherland, supra*). However, the Board does not consider it necessary to deal with the respondent's analysis of the doctrine of *res judicata*. Rather, the Board starts with the undisputed facts that the complainant stopped working for Rapid Ready-Mix in December 1981 and subsequently was referred by the union to another company (Pitts) and worked for that company for some ten months. In the MacDowell decision (paragraph 8), the complainant was found to have been effectively terminated in December 1981, rather than laid off. The complainant's representatives have made no submissions nor stipulated facts which they intended to prove and which, if assumed to be true, would persuade this Board to reach a different conclusion. This Board, then, concurs with the MacDowell decision on this point and finds the complainant to have been terminated, not laid-off, in December 1981. As the alleged contravention of section 68 of the Act arose after that date, the Board finds that the complainant was not a member of the bargaining unit at the time of alleged violation and, therefore, the complainant does not have the necessary status to bring this complaint.

XI

42. For the foregoing reasons, the Board is satisfied that this complaint must be dismissed on the grounds that:

- (a) on the merits, there was no violation of the duty in section 68 of the Act;
 - (b) in the alternative, in these circumstances, the Board would exercise its discretion under Act to decline to inquire into the complaint because of the delay involved;
 - (c) in any event, the complainant was not an "employee in the bargaining unit" at the time of the alleged contravention of section 68 and, hence, the respondent owed no duty of fair representation to the complaint at the relevant time period.
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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1264-83-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Joe Franze Concrete Ltd., (Respondent).

Unit: "all construction labourers employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin." (16 employees in unit).

2311-83-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Holiday Juice Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (25 employees in unit).

2920-83-R: Royal Conservatory of Music Faculty Association, (Applicant) v. Royal Conservatory of Music, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, and the City of Mississauga, engaged in teaching and/or examining functions, save and except Branch Principals, persons above the rank of Branch Principal and persons engaged on limited term visiting appointments." (356 employees in unit). (*Clarity Note*).

0044-84-R: International Union, United Automobile Aerospace and Agricultural Implement Workers of America, (Applicant) v. H. E. Vannatter Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Wallaceburg, Ontario, save and except managers, supervisors, those above the rank of manager and supervisor, executive secretary to the President and General Manager, payroll and benefits administrator, senior design engineers, purchasing agent, shipper and receiver, computer operations head, those persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (12 employees in unit).

0109-84-R: International Woodworkers of America, (Applicant) v. Canarinda Manufacturing Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Canarinda Manufacturing Ltd., Waterford, Ontario, save and except foremen, foreladies, persons above the rank of foreman, forelady, office and sales staff and persons regularly

employed for not more than 24 hours per week.” (92 employees in unit). (*Having regard to the agreement of the parties*).

0667-84-R: Canadian Brotherhood of Railway, Transport and General Workers, (Applicant) v. Howell Transport Canada Inc., (Respondent) v. Employee, (Objector).

Unit: “all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto save and except sales staff, secretary to the President, dispatcher, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (28 employees in unit).

1110-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. The Athlete’s Foot Limited, (Respondent).

Unit: “all employees of the respondent at its Retail Stores in Metropolitan Toronto, save and except floor manager and persons above the rank of floor manager.” (11 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1178-84-R: Local 47 Sheet Metal Workers’ International Association, (Applicant) v. Roy Goodfellow Plumbing & Heating Ltd., (Respondent).

Unit #1: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1204-84-R: Labourers’ International Union of North America, Oil and Gas Technicians, Service, Domestic, and General Workers Local 1267, (Applicant) v. Baboushkin Bros. Ltd., (Respondent).

Unit: “all employees of the respondent at its Artel Manufacturing Division in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1215-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Coles Book Stores Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: “all employees of the respondent at its store at 20 Edward Street in Metropolitan Toronto, save and except floor supervisor and chief cashier, persons above the rank of floor supervisor and chief cashier, general manager, purchasing manager, operations manager, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (28 employees in unit). (*Clarity Note*).

Unit #2: “all employees of the respondent at its store at 20 Edward Street in Metropolitan Toronto, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except general manager, purchasing manager, operations manager, office and clerical staff.” (31 employees in unit).

Unit #3: “all office and clerical employees of the respondent at its store at 20 Edward Street in Metropolitan Toronto, save and except floor supervisor and chief cashier, persons above the rank of floor supervisor and chief cashier, general manager, purchasing manager, operations manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (2 employees in unit).

1242-84-R: The United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting

Industry of the United States and Canada — Local Union 628, (Applicant) v. Lakeland Pipelines Limited, (Respondent) v. Labourers' International Union of North America, Local 607, (Intervener).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Clarity Note*).

1270-84-R: Local 636, International Brotherhood of Electrical Workers AFL-CIO-CLC, (Applicant) v. Markham Hydro Electric Commission, (Respondent) v. R. G. Ewasiuk, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent, save and except foremen, those above the rank of foremen, office staff, arrears officers, students employed for the school vacation period, students employed in a co-operative training programme and persons regularly employed for not more than 24 hours per week." (55 employees in unit). *Having regard to the agreement of the parties*).

1304-84-R: Retail, Wholesale and Department Store Union, AFL;CIO;CLC, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: "all employees of the respondent at its retail store in Brampton save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university." (86 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: *See: Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

1317-84-R: United Plant Guard Workers of America, Local 1962, (Applicant) v. Art Gallery of Ontario, (Respondent).

unit #1: "all security guards employed by the respondent in Metropolitan Toronto save and except assistant managers, persons above the rank of assistant manager and persons regularly employed for not more than 24 hours per week." (11 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all security guards regularly employed for not more than 24 hours per week by the respondent in Metropolitan Toronto save and except assistant managers and persons above the rank of assistant manager." (5 employees in unit). (*Having regard to the agreement of the parties*).

1364-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Myer Salit Limited, (Respondent) v. United Steelworkers of America, (Intervener).

Unit: "all hoisting engineers operating cranes, or mobile-type derricks, oiler-drivers, or mobile cranes employed by the respondent in the Province of Ontario." (2 employees in unit).

1378-84-R: The Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Belle River, (Respondent).

Unit: "all employees of the respondent at Belle River, Ontario, save and except foremen, persons above the rank of foreman, arena manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*).

1408-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Jadco Developments (Northwest) Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

1458-84-R: Energy and Chemical Workers Union, (Applicant) v. S. G. S. Plastics Recycling Inc., (Respondent) v. Group of EMPloyees, (Objectors).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except the plant manager and persons above the rank of plant manager, sales and office staff." (15 employees in unit).

1483-84-R: Labourers' International Union of North America, Local 607, (Applicant) v. Lakeland Pipelines Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

1534-84-R: Office and Professional Employees International Union, (Applicant) v. Metropolitan Toronto Police Association, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week save and except Members' Benefits Co-ordinator and persons above the rank of Members' Benefits Co-ordinator." (7 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1535-84-R: Office and Professional Employees International Union, (Applicant) v. Metropolitan Toronto Police Association, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except Members' Benefits Co-ordinator, persons above the rank of Members' Benefits Co-ordinator and persons regularly employed for not more than twenty-four (24) hours per week." (27 employees in unit). (*Having regard to the agreement of the parties*).

1547-84-R: Canadian Paperworkers Union, (Applicant) v. Inter-City Papers Limited, (Respondent).

Unit: "all employees of the respondent in its Prince Wilson Division at the City of Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

1608-84-R: Canadian Union of Public Employees, (Applicant) v. Family Counselling Centre of Cornwall and United Counties, (Respondent).

Unit: "all employees of the respondent working at or out of Cornwall, Ontario save and except the supervisor of credit counselling division, persons above the rank of supervisor of credit counselling division, the office administrator, and the co-ordinator of parent relief." (17 employees in unit). (*Having regard to the agreement of the parties*).

1610-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Began Dee Holdings Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and the persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the

industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1618-84-R: Service Employees Union Local 633, A.F. of L., C.I.O., C.L.C., (Applicant) v. Prince Edward County Memorial Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all paramedical employees of the respondent at Picton, Ontario, save and except supervisors, persons above the rank of supervisor, and persons covered by the subsisting collective agreement." (10 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1626-84-R: International Molders & Allied Workers' Union, (Applicant) v. Galtaco Inc., C.T.R. & D. Division, (Respondent).

Unit: "all employees of the respondent at its C.T.R. and D. Division, Paris, Ontario, save and except supervisor, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

1631-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Williams Contracting Ltd., (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1632-84-R: Ontario Public Service Employees Union, (Applicant) v. Brockville & Area Community Living Association, (Respondent).

Unit #1: "all employees of the respondent in the United Counties of Leeds and Grenville, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent in the United Counties of Leeds and Grenville regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and clerical staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

1633-84-R: Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Horton C.B.I. Limited, (Respondent) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Intervener).

Unit #1: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, and employees covered by a subsisting collective agreement between the respondent and the employer." (4 employees in unit).

Unit #2: "all millwrights and millwrights' apprentices in the employ of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen and persons above the rank of non-working foreman, and employees covered by the subsisting collective agreement between the respondent and the intervener." (4 employees in unit).

1648-84-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. National Refrigeration of Canada, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1650-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: (*See: Applications for Certification Dismissed — No Vote Conducted*).

Unit #2: "all office and clerical employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period at its retail stores in Kitchener, save and except personnel and office manager and persons above the rank of personnel and office manager, students employed on a co-operative programme with a school, college or university." (5 employees in unit).

1668-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Penvidic Contracting (1971) Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

1669-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Brantco Construction, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1690-84-R: United Steelworkers of America, (Applicant) v. Concord Steel Centre Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Vaughan save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

1696-84-R: Ontario Public Service Employees Union, (Applicant) v. North Grenville District Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the Respondent in the United Counties of Leeds and Grenville, save and except supervisors, persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

1727-84-R: Teamsters Local Union No. 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Ware-X Warehousing and Distributing, (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, office clerical and sales staff." (9 employees in unit). (*Having regard to the agreement of the parties*).

1733-84-R: Amalgamated Transit Union, Local 113, (Applicant) v. All-Way Transportation Corporation (Wheel-Trans Division), (Respondent).

Unit: "all employees of the respondent in its Wheel-Trans Division in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by subsisting collective agreement." (26 employees in unit). (*Having regard to the agreement of the parties*).

1746-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Centoco Manufacturing Limited, (Respondent).

Unit: "all employees of the respondent at Tilbury, Ontario, save and except foremen, employees above the rank of foremen, office, clerical, technical and sales staff, employees regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1748-84-R: The Canadian Union of Public Employees, (Applicant) v. The Board of Education for the City of Etobicoke, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in its elementary schools in the City of Etobicoke, Ontario, save and except supervisors, persons above the rank of supervisor, persons covered by the subsisting collective agreements and persons regularly employed for not more than twenty-four (24) hours per week." (65 employees in unit). (*Clarity Note*).

1757-84-R: United Steelworkers of America, (Applicant) v. Wright Abrasives Inc., (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (23 employees in unit). (*Having regard to the agreement of the parties*).

1760-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Jovis Construction Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1762-84-R: Ontario Public Service Employees Union, (Applicant) v. North Bay and District Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent at North Bay, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except program supervisors, group home supervisors, persons above the rank of program supervisor, group home supervisor, office and clerical staff and employees covered by subsisting collective agreement." (30 employees in unit). (*Having regard to the agreement of the parties*).

1766-84-R: London and District Service Workers' Union, Local 220, SEIU, AFL, CIO, CLC, (Applicant) v. The Salvation Army A. R. Goudie Eventide Home, (Respondent).

Unit: "all employees of the respondent at Kitchener, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1767-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. M. V. Mark Inc., (Respondent).

Unit#1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1769-84-R: Canadian Union of Public Employees, (Applicant) v. 39 Anthony Inc., carrying on business as Sunrise Home, (Respondent).

Unit #1: "all employees of the respondent at Cornwall, Ontario, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than twenty-four hours per week." (21 employees in unit).

Unit #2: "all employees of the respondent at Cornwall, Ontario regularly employed for not more than twenty-four hours per week, save and except supervisors and persons above the rank of supervisor." (4 employees in unit).

1775-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. 3M Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Burlington, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, laboratory personnel, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (31 employees in unit). (*Having regard to the agreement of the parties*).

1777-84-R: United Steelworkers of America, (Applicant) v. Frost Products Limited, (Respondent).

Unit: "all employees of the respondent in the City of Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (29 employees in unit). (*Having regard to the agreement of the parties*).

1780-84-R: Canadian Merchandising Employees Union, (Applicant) v. LPC Papers Ltd., (Respondent).

Unit: "all employees of the respondent at Hawkesbury, Ontario, save and except foremen, persons above

the rank of foreman, office and sales staff, and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1800-84-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of Jaffray and Melick, (Respondent).

Unit: “all office and clerical employees of the respondent in the Municipality of the Township of Jaffray and Melick, save and except Assistant Clerk Treasurer, persons above the rank of Assistant Clerk Treasurer and persons covered by a subsisting collective agreement.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1826-84-R: Labourers’ International Union of North America, Local 1059, (Applicant) v. Bradslil Limited, (Respondent).

Unit: “all construction labourers’ in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1851-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Joseph Anthony Fine Furniture Ltd., (Respondent).

Unit: “all employees of the respondent at Windsor, Ontario, save and except managers, persons above the rank of manager, office staff, warehouse staff and cleaning staff.” (7 employees in unit). (*Having regard to the agreement of the parties*).

1852-84-R: United Brotherhood of Carpenters and Joiners of America, Local 675, (Applicant) v. Mandic Bros. Drywall and construction Ltd., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1924-84-R: Ironworkers District Council of Ontario, (Applicant) v. Kornovski & Keller Contractors Ltd., (Respondent).

Unit#1: “all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all reinforcing rodmen in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1925-84-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Bear Bay Construction Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Municipality of Metropolitan

Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0836-84-R: Energy and Chemical Workers Union, (Applicant) v. Maple Leaf Mills Limited, Master Feeds Division, (Respondent) v. Teamsters, Local Union 879, (Intervener).

Unit: "all employees of the company working in the Feed and Pet Food Plant at Guelph, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (34 employees in unit).

Number of names of persons on revised voters' list		38
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		28
Number of ballots marked in favour of intervener		3
Ballots segregated and not counted		2

1286-84-R: Energy and Chemical Workers Union, CLC, (Applicant) v. Indusmin Limited, (Respondent) v. Cement Lime Gypsum and Allied Workers, AFL-CIO-CFL, (Intervener).

Unit: "all employees of the respondent at its mine and plant in Nephton, Ontario, including all hourly-rated employees, save and except officers of the company, management personnel, supervisors, foremen, hourly-rated employees above the rank of working sub-foremen, secretary to mine manager, draftsmen, surveyors, janitors and watchmen, employees who have had less than thirty (30) days of service or two hundred and forty (240) hours worked, whichever comes first." (98 employees in unit).

Number of names of persons on list as originally prepared by employer		98
Number of persons who cast ballots	90	
Number of ballots marked in favour of applicant		67
Number of ballots marked in favour of intervener		22
Ballots segregated and not counted		1

1438-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. Atlantic Sugar Limited, (Respondent) v. Canadian Union of Operating Engineers and General Workers, Local 101, (Intervener).

Unit: "all employees of the respondent at its Oshawa, Ontario Plant, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, sugar boilers, security guards, stationary engineers, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (85 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		84
Number of persons who cast ballots	77	
Number of ballots marked in favour of applicant		62
Number of ballots marked in favour of intervener		15

1439-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW), (Applicant) v. Atlantic Sugar Limited, (Respondent) v. Canadian Union of Operating Engineers and General Workers, Local 101, (Intervener).

Unit: "all stationary engineers of the respondent and persons primarily engaged as their helpers in its boiler room at the Oshawa, Ontario Plant, save and except the chief operating engineer and persons

above the rank of chief operating engineer.” (6 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		5
Number of ballots marked in favour of intervener		0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2819-83-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Hamilton Public Library Board, (Respondent).

Unit: “all employees of the respondent in the City of Hamilton regularly employed for less than twenty-one hours per week, save and except supervisors, persons above the rank of supervisor, confidential secretary, security guards, shelf readers, pages, casual part-time helpers, students employed during the school vacation period and persons covered by subsisting collective agreement.” (74 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters’ list		33
Number of persons who cast ballots	14	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		1

1062-84-R: Hotel Employees and Restaurant Employees Union, Local 75, (Applicant) v. Cara Operations Limited, (Respondent).

Unit: “all employees of the respondent’s Urban Restaurant Division working at Commerce Court, in the City of Toronto, in the premises known as Harvey’s and Marti’s, save and except assistant manager, those above the rank of assistant manager, office and sales staff, those persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (30 employees in unit). (*Granted*).

Number of names of persons on revised voters’ list		16
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant		10
Number of ballots marked against applicant		6

0174-84-R: Ontario Public Service Employees Union, (Applicant) v. Law Society of Upper Canada, Administrator of the Ontario Legal Aid Plan, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at its York County Office in the Municipality of Metropolitan Toronto, save and except Criminal Entitlement Officer, Assistant Entitlement Officer, Administration Supervisor, persons above the rank of Criminal Entitlement Officer, Assistant Entitlement Officer, Administration Supervisor, members of the legal profession employed in a professional capacity, secretaries to the Area Director and the Administrator/Personnel Manager, Civil Unit Secretarial Supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (55 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		50
Number of persons who cast ballots	44	
Number of ballots marked in favour of applicant		23
Number of ballots marked against applicant		19
Ballots segregated and not counted		2

1296-84-R: Energy and Chemical Workers Union, CLC, (Applicant) v. Indusmin Limited, (Respondent) v. Cement Lime Gypsum and Allied Workers AFL-CIO-CFL, (Intervener).

Unit: "all hourly rated employees of the respondent at Nephton, Ontario, save and except Supervisors, Foremen, those above the rank of Supervisor, Foreman, Secretary to Mine Manager, Draftsmen, Surveyors, Janitors and Watchmen." (98 employees in unit). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		98
Number of persons who cast ballots	90	
Number of ballots marked in favour of applicant		67
Number of ballots marked in favour of intervener	22	
Ballots segregated and not counted		1

1304-84-R: Retail, Wholesale and Department Store Union, AFL;CIO;CLC;, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: (See: *Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at its retail store in Brampton save and except department supervisors, persons above the rank of department supervisor, security staff, management trainees, office and clerical staff, and students employed on a co-operative program with a school, college or university." (90 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		101
Number of persons who cast ballots	77	
Number of ballots marked in favour of applicant		55
Number of ballots marked against applicant		15
Ballots segregated and not counted		7

1324-84-R: Ontario Nurses' Association, (Applicant) v. York-Finch General Hospital, (Respondent) v. Group of Employees, (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in the Municipality of Metropolitan Toronto, save and except unit supervisors, persons above the rank of unit supervisor, quality assurance co-ordinator, employee health co-ordinator, staff training and development co-ordinator and persons regularly employed for not more than twenty-four (24) hours per week." (196 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		199
Number of persons who cast ballots	189	
Number of ballots marked in favour of applicant		128
Number of ballots marked against applicant		26
Ballots segregated and not counted		35

1550-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Van de Hogen Material Handling Inc., (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office, sales and clerical staff." (32 employees in unit). (*Having regard to the agreement to the parties*).

Number of names of persons on list on originally prepared by employer		25
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		9

Applications for Certification Dismissed — No Vote Conducted

0798-84-R: International Brotherhood of Painters and Allied Trades, Local 1590, (Applicant) v. Heath Engineering Limited, (Respondent). (35 employees in unit).

1499-84-R: United Steelworkers of America, (Applicant) v. C.H. Heist Ltd., (Respondent). (64 employees in unit).

1617-84-R: Labourers' International Union of North America, Local 749, (Applicant) v. Ducana Vinyl Therm Inc., (Respondent). (8 employees in unit).

1630-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener) v. Group of Employees, (Objectors). (1128 employees in unit).

1650-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit #1: "all office and clerical employees of the respondent at its retail stores in Kitchener, save and except personnel and office manager, persons above the rank of personnel and office manager, senior clerk and general clerk, personnel department, secretary to the store manager, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university." (15 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See: Bargaining Agents Certified — No Vote Conducted*).

1723-84-R: Hotels, Clubs, Restaurants & Taverns Employees' Union Local 261, (Applicant) v. The Westin Hotel, (Respondent). (295 employees in unit).

1759-84-R: Representatives National Union, (Applicant) v. Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, (Respondent). (18 employees in unit).

1776-84-R: Energy and Chemical Workers Union, (Applicant) v. Provincial Gas Company, (Respondent) v. Group of Employees, (Objectors). (109 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0039-84-R: Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Woodstream Corporation, (Respondent).

Unit: "all employees of the respondent in Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (52 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		49
Number of persons who cast ballots	48	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		46
Number of ballots marked in favour of applicant		24
Number of ballots marked against applicant		22
Ballots segregated and not counted		2

1389-84-R: Retail Wholesale and Department Store Union, (Applicant) v. T. Eaton Company Limited, (Respondent).

Unit #1: "all employees of the respondent at its Retail Store at 333-365 Wellington Street, London, save and except Sales Managers, Merchandise Presentation Managers, Food Services Managers and Foremen, office and clerical staff, employees of Eaton Travel Ltd, employees of Eaton Bay Financial Services, Management Trainees, personnel Staff, Security Staff, Pharmacists, Medical Services Nurses, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a co-operative program with a School, College or University." (80 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		107
Number of persons who cast ballots	104	
Number of ballots marked in favour of applicant		44
Number of ballots marked against applicant		60

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except Sales Manager, Merchandise Presentation Manger, Food Services Manager and Foremen and persons above the rank of Sales Manager, Merchandise Presentation Manager, Food Services Manager and Foreman, office and clerical staff, employees of Eaton Travel Ltd., employees of the Eaton Bay Financial Services, Management Trainees, Personnel Staff, Security Staff, Pharmacists, medical Services Nurses, and students employed on a co-operative program with a School, College or University." (94 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		248
Number of persons who cast ballots	240	
Number of ballots marked in favour of applicant		85
Number of ballots marked against applicant		149
Ballots segregated and not counted		6

1460-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Hospital General de Hawkesbury and District General Hospital Inc., (Respondent) v. Canadian Union of Public Employees, (Intervener).

Unit: "all lay office and clerical employees of the respondent at Hawkesbury, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except the secretary of the Executive Director, the secretary of the Director of Finance and Personnel, the secretary of the Director of Nursing, supervisors and persons above the rank of supervisor." (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		2
Number of ballots marked in favour of intervener		4

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0250-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Hymopack Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent employed in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly

employed for not more than 24 hours per week and students employed during the school vacation period.” (82 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		82
Number of persons who cast ballots	77	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		32
Number of ballots marked against applicant		42
Ballots segregated and not counted		1

1476-84-R: Teamsters Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, (Applicant) v. Acriform Engineering Inc., (Respondent) v. Groups of Employees, (Objectors).

Unit: “all employees of the respondent in Newmarket, Ontario, save and except foremen, those above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (43 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		40
Number of persons who cast ballots		39
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		26

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0538-84-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Active Mechanical Inc., (Respondent).

1097-84-R: Labourers' International Union of North America, (Applicant) v. Alwell Forming London Limited Colony Investments London Limited, (Respondent).

1213-84-R: Ironworkers District Council of Ontario, (Applicant) v. Industrial Task Force Ltd., (Respondent) v. Group of Employees, (Objectors).

1390-84-R: Ironworkers District Council of Ontario, (Applicant) v. Baumeister Constructors Ltd., (Respondent).

1551-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Bre-Ex Limited, (Respondent) v. Labourers' International Union of North America, Local 1059, (Intervener).

1565-84-R: Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261, (Applicant) v. Westin Hotel, (Respondent).

1703-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Murphy Distributing (Sarnia) Ltd., (Respondent).

1705-84-R: Service Employees Union, Local 204, Affiliated with S.E.I.U. A.F. of L., C.I.O., C.L.C., (Applicant) v. The Board of Management of the O'Keefe Centre, (Respondent) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, (Intervener #1) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, of the United States and Canada, Local B173, (Intervener #2).

1706-84-R: Service Employees Union, Local 210, affiliated with Service Employees International Union AFL, CIO, CLC, (Applicant) v. Bowlero Bowl Limited, (Respondent).

1713-84-R: St. Catharines Metal Fabricators Association, (Applicant) v. Nesbitt Metal Fabricators Limited, (Respondent) v. Sheet Metal Workers' International Association, Local Union 537-568, (Intervener).

1726-84-R: Ontario Public Service Employees Union, (Applicant) v. Ongwanada Hospital — Penrose Division, (Respondent).

1815-84-R: United Cement, Lime, Gypsum and Allied Workers International Union, A.F.L., C.I.O., C.F.L., (Applicant) v. Plastics CMP Limited, (Respondent).

1834-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88 AFL:CIO:CLC, (Applicant) v. Famz Foods, c.o.b. as Swiss Chalet, (Respondent).

1835-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL:CIO:CLC:, (Applicant) v. Rahims Foods Ltd. c.o.b. as Swiss Chalet, (Respondent).

1840-84-R: Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL:CIO:CLC:, (Applicant) v. F. G. Andrioulo Foods Inc., c.o.b. as Swiss Chalet, (Respondent).

1914-84-R: The Ontario Provincial Conference, of The International Union of Bricklayers & Allied Craftsmen, (Applicant) v. Salvatore D'Amore Masonry Ltd., (Respondent).

1994-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Ford Glass Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1063-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38, (Applicant) v. Decew Crafts Inc., Stephens & Rankin Inc., Stephens & Bass Limited, and D. L. Stephens Contracting (Niagara) Ltd., (Respondent) v. Christian Labour Association of Canada, (Intervener). (*Withdrawn*).

1613-83-R: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. D.K. Construction Ltd., and Pioneer Sports World Inc., (Respondents). (*Withdrawn*).

1621-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Lavern Construction Co. Ltd. and 506162 Ontario Ltd., carrying on business as LCM Developments Ltd., (Respondents). (*Granted*).

1806-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Harley Transport Limited, Bryan Cathcart, and Ottor Forwarders Ltd., (Respondents). (*Granted*).

3106-83-R: Sheet Metal Workers' International Association Local Union 537, (Applicant) v. Philip Doyle Limited, Philip Doyle Mechanical Inc., and Philip Doyle Manufacturing, (Respondents). (*Withdrawn*).

0394-84-R: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Old King Painters Ltd., Regina Campoli and Anna Salatti, carrying on business under the name and style of Princes Painting, (Respondents). (*Granted*).

0759-84-R: Sheet Metal Workers International Association, Local 285, (Applicant) v. Applewood Air-Conditioning Limited, Applewood Air-Conditioning (Ottawa) Limited, (Respondents). (*Dismissed*).

0829-84-R: International Association of Machinists and Aerospace Workers Local Lodge 1740, (Applicant) v. Do-Tan Manufacturing Limited, 414655 Ontario Limited, carrying on business as Tanner Industries and J. R. Tanner, (Respondents). (*Dismissed*).

1244-84-R: The International Brotherhood of Electrical Workers, Local Union 120, (Applicant) v. Geco Contractors Assoc. Inc. and George T. Greenside Electrical Contracting Company Limited, (Respondents). (*Granted*).

1315-84-R: London and District Service Workers' Union, Local 220, (Applicant) v. Strathroy Nursing Home and Futura Management, (Respondents). (*Granted*).

1488-84-R: Millwrights District Council of Ontario on behalf of Local 1916, (Applicant) v. Daniel Steel Installation and Burlington Steel Erectors Ltd., (Respondents). (*Granted*).

1619-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Scofan Contractors Limited, (Respondent). (*Withdrawn*).

1879-84-R: Labourers' International Union of North America, Local 749, (Applicant) v. Ducana Vinyl Therm Inc., Ducana Building Products Ltd., (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

0759-84-R: Sheet Metal Workers International Association, Local 285, (Applicant) v. Applewood Air-Conditioning Limited, Applewood Air-Conditioning (Ottawa) Limited, (Respondents). (*Dismissed*).

1063-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38, (Applicant) v. Decew Crafts Inc., Stephens & Rankin Inc., Stephens & Bass Limited, and D. L. Stephens Contracting (Niagara) Ltd., (Respondents) v. Christian Labour Association of Canada, (Intervener). (*Dismissed*).

1805-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 304, (Applicant) v. Harley Transport Limited, Bryan Cathcart, and Ottor Forwarders Ltd., (Respondents). (*Dismissed*).

3107-83-R: Sheet Metal Workers' International Association Local Union 537, (Applicant) v. Philip Doyle Limited, Philip Doyle Mechanical Inc., and Philip Doyle Manufacturing, (Respondents). (*Withdrawn*).

0301-84-R: Bricklayers, Masons Independent Union of Canada Local 1, (Applicant) v. Masonry Contractors Association of Toronto Inc., Parent Masonry Limited, Early Spring Investments Limited and The Royal Bank of Canada and Nick D'Agostino, (Respondents). (*Granted*).

0394-84-R: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Old

King Painters Ltd., Regina Campoli and Anna Salatti, carrying on business under the name and style of Princes Painting, (Respondents). (*Granted*).

0484-84-R: United Food and Commercial Workers, Local 1000A, (Applicant) v. The Kitchen Table (John Rumig), (Respondent). (*Withdrawn*).

0728-84-R: Retail, Wholesale and Department Store Union, Local 414, (Applicant) v. 564070 Ontario Inc., c.o.b. as Gilham Foods, Greg Guilfoil and Doug Hann, (Respondents) v. Dominion Stores Ltd., (Intervener). (*Dismissed*).

0759-84-R: Sheet Metal Workers International Association, Local 285, (Applicant) v. Applewood Air-Conditioning Limited, Applewood Air-Conditioning (Ottawa) Limited, (Respondent). (*Dismissed*).

0828-84-R: International Association of Machinists and Aerospace Workers Local Lodge 1740, (Applicant) v. Do-Tan Manufacturing Limited, 414655 Ontario Limited, carrying on business as Tanner Industries and J. R. Tanner, (Respondents). (*Granted*).

1243-84-R: The International Brotherhood of Electrical Workers, Local Union 120, (Applicant) v. Geco Contractors Assoc. Inc., (Respondent). (*Dismissed*).

1350-84-R: United Food and Commercial Workers Local 206, (Applicant) v. V. S. Services Ltd., (Respondent). (*Dismissed*).

UNION SUCCESSOR RIGHTS

1295-84-R: Ontario Public Service Employees Union, (Applicant) v. Her Majesty The Queen in Right of Ontario and The Regional Children's Centre of Thunder Bay, (Respondents) v. Group of Employees, (Objectors). (*Granted*).

APPLICATIONS FOR DECLARATION OF TERMINATING BARGAINING RIGHTS

2315-83-R: M. E. (Lyn) MacDonald, Donna L. Peever, Sheila Murray, Aileen Hicks, (Applicant) v. Health, Office and Professional Employees, Local 1976 chartered by the United Food and Commercial Workers International Union C.L.C. AFL CIO, (Respondent). (*Withdrawn*). (27 employees in unit).

2896-83-R: William James French and William Lorne Mitchell, (Applicants) v. Office and Professional Employees International Union, Local 219, (Respondent) v. Pic River Forest Products Limited, (Intervener).

Unit: "all salaried employees of Pic River employed in woodlands accounting in its Marathon office." (2 employees in unit). (*Granted*). (*Clarity Note*).

Number of names of persons on revised voters' list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		2

0122-84-R: Arthur Thompson, (Applicant) v. Ontario Public Service Employees Union, (Respondent) v. Circle R Boys Ranch, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of Circle R Boys Ranch in Cookstown, save and except programme co-ordinator, persons above the rank of programme co-ordinator, office and clerical staff and students employed during the school vacation period." (23 employees in unit). (*Dismissed*).

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	24	
Number of ballots marked in favour of respondent		13
Number of ballots marked against respondent		11

0288-84-R: William J. Knipfel, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 785, (Respondent) v. Ariss Construction, (Intervener).

Unit: "all journeymen and apprentice carpenters, other than millwrights, employed by the intervener and engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario." (7 employees in unit). (*Dismissed*).

0317-84-R: Karl Borkala, (Applicant) v. Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, (Respondent) v. 466364 Ontario Limited o/a Maple Leaf Tavern, (Intervener). (4 employees in unit). (*Dismissed*).

0478-84-R: Nana Agyemang on his own behalf and on behalf of all other employees of Woodbridge Foam Corporation Corporation (Woodbridge Plant), (Applicant) v. Amalgamated Clothing and Textile Workers Union, C.L.C., A.F.L., C.I.O., Greater Toronto Textile Joint Board, Local 1438, (Respondent) v. Woodbridge Foam Corporation (Woodbridge Plant), (Intervener).

Unit: "all employees of the intervener at its Woodbridge Plant, with the exception of foremen, persons above the rank of foreman, office staff and persons regularly employed for 27 hours or less of the regular work week, on July 5, 1984." (400 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		344
Number of persons who cast ballots	344	
Number of spoiled ballots		4
Number of ballots marked in favour of respondent		24
Number of ballots marked against respondent		314

0578-84-R: Andre Cleroux, (Applicant) v. Construction Council of Ontario of the International Brotherhood of Electrical Workers, (Respondent). (*Withdrawn*). (1 employee in unit).

0588-84-R: Sharon Fleming and Daniel Beatty, (Applicants) v. Service Employees Union Local 183, (Respondent) v. Rickarton Castle Hotel, (Intervener).

Unit: "all employees of Rickarton Castle Hotel in Picton, Ontario, save and except bookkeeper and accountant, general manager and persons above the rank of general manager." (14 employees in unit). (*Granted*).

1195-84-R: William Jack Huhtalo, (Applicant) v. Local 8473 of the United Steelworkers of America, (Respondent) v. Horton CBI, Limited, (Intervener).

Unit: "all office, clerical and technical employees of Horton CBI, Limited at Fort Erie, save and except professional engineers, squad leaders, foremen or supervisors, persons above the rank of squad leader foreman or supervisor, personnel department clerks, buyers, (and) one secretary to each of the following: Manager of Operations, Treasurer, Engineering Manager and Construction Manager, students employed during the school vacation period, trainees hired in the advancement program, employees who regularly work for not more than twenty-four (24) hours per week and employees covered by subsisting collective agreements." (33 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	24	
Number of ballots marked in favour of respondent		6
Number of ballots marked against respondent		18

1256-84-R: Julian Tullett, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Bramalea Limited, (Intervener). (55 employees in unit). (*Withdrawn*).

1300-84-R: O'Keefe Centre for the Performing Arts, (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local B173, (Respondent) v. Group of Employees, (Objectors). (55 employees in unit). (*Dismissed*).

1355-84-R: E. D. Speziale, (Applicant) v. Hotel Employees, Restaurant Employees Union, Local 75, (Respondent) v. Joe Lazazzere, c.o.b. as Tim Horton Donuts, (Intervener).

Unit: "all employees of Joe Lazazzere c.o.b. as Tim Horton Donuts in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (17 employees in unit). (*Granted*).

1382-84-R: Paul Spragg, (Applicant) v. United Food and Commercial Workers International Union, A.F.L.-C.I.O.-C.L.C., Local 114-4P, (Respondent) v. J. Shaffer, (Intervener #1) v. H. Tenenbaum, (Intervener #2) v. Group of Employees, (Objectors). (28 employees in unit). (*Dismissed*).

2040-84-R: Debbie Lumley, Jackie Gannon, Lyn MacDonald, (Applicants) v. Health, Office and Professional Employees, Local 1976, Chartered by the United Food and Commercial Workers International Union, (Respondent). (28 employees in unit). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0220-83-U; 0258-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. The Mill Restaurant, (Respondent). (*Withdrawn*).

0305-83-U: Energy and Chemical Workers Union, (Complainant) v. Union Carbide Canada Limited — Moore Plant, (Respondent). (*Dismissed*).

1286-83-U: Labourers' International Union of North America, Local 1059, (Complainant) v. Joe Franze Concrete Ltd., (Respondent). (*Granted*).

1315-83-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Complainant) v. Maple Leaf Taxi Company Ltd., (Respondent). (*Withdrawn*).

1550-83-U: Vazken Kaljian, (Complainant) v. Canadian Union of Public Employees, Local 1996, (Respondent) v. Toronto Public Library Board, (Intervener). (*Dismissed*).

1649-83-U: United Steelworkers of America, (Complainant) v. Shaw-Almex Industries Limited, (Respondent). (*Granted*).

2200-83-U: Ramdian Narayan, (Complainant) v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (Respondent) v. Chrysler Canada Ltd., (Intervener). (*Dismissed*).

2236-83-U: International Ladies' Garment Workers' Union, (Complainant) v. Sportswear City Limited and Ernest Waxman, (Respondent). (*Withdrawn*).

2310-83-U: John Glykis, (Complainant) v. Hotel Employees Restaurant Employees Union, Local 75 and The Four Seasons Hotels Limited (Inn on the Park), (Respondents). (*Granted*).

2368-83-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union

No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Holiday Juice Ltd., (Respondent). (*Granted*).

2385-83-U: Rajinder Dhillon, (Complainant) v. Canadian Pizza Crust Co. Ltd., (Respondent). (*Dismissed*).

2594-83-U: William Frederick Burrows, (Complainant) v. Lloyd McHugh & Son Limited and The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada and Local 345 of The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, (Respondents). (*Withdrawn*).

3123-83-U: Salvatore Farago, (Complainant) v. The Labourers' International Union of North America, Local 527 and Nello Scipioni, Bernardino Carozzi and Ugo Panetta, (Respondents). (*Dismissed*).

3125-83-U; 0052-84-U: Canadian Labour Congress, (Complainant) v. 367402 Ontario Limited, (Respondent). (*Withdrawn*).

0119-84-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers, Local No. 304, (Complainant) v. Canada Trustco Mortgage Company, (Respondent). (*Dismissed*).

0149-84-U: The United Brotherhood of Carpenters and Joiners of America, Local 3054 and David Scott, (Complainant) v. General Home Systems Ltd., (Respondent). (*Withdrawn*).

0243-84-U: Canadian Pneumatic Control Contractors Association, (Complainant) v. The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and Mechanical Contractors Association of Ontario, (Respondents). (*Granted*).

0658-84-U: Robert D. LeBlanc, (Complainant) v. United Auto Workers, Local 222, (Respondent). (*Withdrawn*).

0687-84-U: Millwrights' District Council of Ontario, (Complainant) v. Active Mechanical Inc., (505514 Ontario Inc.), (Respondent). (*Withdrawn*).

0736-84-U: Ottawa-Carleton Public Employees Union, CUPE Local 503, (Complainant) v. Dev Tyagi and The Corporation of the City of Ottawa, (Respondent). (*Withdrawn*).

0755-84-U: Bricklayers, Masons Independent Union of Canada Local 1, (Complainant) v. Parent Masonry Limited, Early Spring Investments Limited and The Royal Bank of Canada and Nick D'Agostino, (Respondents). (*Dismissed*).

0867-84-U: MacLaren S. Beveridge, per (Attached list of members), (Complainant) v. Aluminum Brick and Glass Workers International Union, Local 252, (Respondent). (*Withdrawn*).

0955-84-U: Donald A. Gardner & Associates, (Complainant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Peel Condominium Corporation No. 95, (Intervener). (*Dismissed*).

0956-84-U: Donald A. Gardner & Associates, (Complainant) v. Peel Condominium Corporation No. 95, (Respondent) v. Labourers' International Union of North America, Local 183, (Intervener). (*Dismissed*).

1016-84-U: Gerald Earl Drouillard, (Complainant) v. Local 89, of the International Union, United

Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Respondent). (*Withdrawn*).

1075-84-U: Peter Galiatsos, (Complainant) v. Local Union #173, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operations of The United States and Canada, (Respondent). (*Withdrawn*).

1077-84-U: United Steelworkers of America, (Complainant) v. Infasco Nut Company Division of Ivaco Inc., (Respondent). (*Withdrawn*).

1145-84-U: Labourers' International Union of North America, Local 1059, (Complainant) v. Alwell Forming London Limited, Colony Investments London Limited, Leo Simas, (Respondents). (*Withdrawn*).

1188-84-U: The International Brotherhood of Electrical Workers, Local Union 1788, (Complainant) v. Ontario Hydro and Bill Hamilton et al, (Respondents). (*Withdrawn*).

1227-84-U: Local 47 Sheet Metal Workers International Association, Donald Hannah and James Bissell, (Complainants) v. Roy Goodfellow Plumbing and Heating Ltd., (Respondent). (*Withdrawn*).

1237-84-U: Cornelius Constantine, 371 Orton Park Rd Unit 8 Scarborough, M1G 3T4, (Complainant) v. Hotel Employees Restaurant Employees Union Local 75, 1992 Yonge Street, Suite 306, Toronto M4S 1Z2, (Respondent) v. The Westin Hotel, (Intervener). (*Withdrawn*).

1285-84-U: Ironworkers District Council of Ontario, (Complainant) v. Industrial Task Force Ltd., (Respondent). (*Withdrawn*).

1289-84-U: United Food and Commercial Workers International Union, (Complainant) v. Rahims Foods Limited, (Respondent). (*Withdrawn*).

1314-84-U: London and District Service Workers' Union, Local 220, (Complainant) v. Strathroy Nursing Home, (Respondent). (*Withdrawn*).

1316-84-U: Catherine A. Lister, (Complainant) v. Canadian Guards Association, Local 111, (Respondent). (*Withdrawn*).

1357-84-U: United Food and Commercial Workers International Union, Local 1105P Region 18, (Complainant) v. Saville Food Products Incorporated, (Respondent). (*Granted*).

1367-84-U: St. Catharines Typographical Union Local 416, (Complainant) v. High Times Publication Ltd., (Respondent). (*Granted*).

1374-84-U: Labourers' International Union of North America, Local 1059, (Complainant) v. Colony Investments (London) Limited, (Respondent). (*Withdrawn*).

1385-84-U: Canadian Union of Educational Workers, (Complainant) v. York University, (Respondent). (*Withdrawn*).

1396-84-U: The Canadian Union of Public Employees, (Complainant) v. Toronto Western Hospital, (Respondent). (*Withdrawn*).

1398-84-U: The United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, (Complainant) v. Elbertsen Industries Limited, (Respondent). (*Withdrawn*).

1414-84-U: As per attached list, (Complainants) v. Local 49, International Molders and Allied Workers Union, (Respondent). (*Withdrawn*).

1417-84-U: Operational Staff of Lambton Area Water Supply System, (Complainant) v. Ontario Public Servants Employees Union, (Respondent). (*Withdrawn*).

1430-84-U: John West #4841 & Furlough Position (indirectly), (Complainant) v. Local 113 A.T.U., (Respondent). (*Withdrawn*).

1475-84-U: Labourers' International Union of North America, Local 183, (Complainant) v. Bramalea Limited, (Respondent) v. Julian Tullett, (Intervener). (*Withdrawn*).

1479-84-U: The Canadian Guards Association, (Complainant) v. Inglis Limited, (Respondent). (*Withdrawn*).

1485-84-U: Ontario Public Service Employees Union, (Complainant) v. Peterborough Civic Hospital, (Respondent). (*Withdrawn*).

1527-84-U: Ironworkers District Council of Ontario, (Complainant) v. Industrial Task Force Ltd., (Respondent). (*Withdrawn*).

1531-84-U: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Complainant) v. Hudson's Bay Wholesale, (Respondent). (*Withdrawn*).

1609-84-U: Sheet Metal Workers' International Association, Local 47 and Ronald Hannah, (Complainants) v. M. & Al Roofing Limited, (Respondent). (*Withdrawn*).

1620-84-U: Patricia A. MacKinnon, (Complainant) v. James L. McBane, (Respondent). (*Withdrawn*).

1654-84-U: Canadian Union of Operating Engineers and General Workers' (Complainant) v. Yonge-Eglinton Centre: Management Services, (Respondent). (*Withdrawn*).

1673-84-U: International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. Simcoe Public House, & 57599 Ontario Ltd., (Respondent). (*Withdrawn*).

1680-84-U: Ironworkers District Council of Ontario, (Complainant) v. Industrial Task Force Ltd., (Respondent). (*Withdrawn*).

1682-84-U: Labourers' International Union of North America, Local 1059, (Applicant) v. W. J. Broome Limited, (Respondent). (*Withdrawn*).

1687-84-U: L'Hotel — CN Hotels Inc./ Caroline Griffin, (Complainant) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351, (Respondent). (*Withdrawn*).

1695-84-U: The United Brotherhood of Carpenters and Joiners of America, Local 27, (Complainant) v. J. A. MacDonald Ltd., (Respondent). (*Withdrawn*).

1697-84-U: L'Hotel — CN Hotels Inc., (Complainant) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351, (Respondent). (*Withdrawn*).

1725-84-U: L'Hotel — CN Hotels Inc./Vaughan A. Crosskill/Female Employee, (Complainant) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351, (Respondent). (*Withdrawn*).

1803-84-U: Hotels, Clubs, Restaurants & Taverns Employees' Union Local 261, (Complainant) v. Fernando Sanchez, Maitre D' and Skyline Hotel, (Respondent). (*Withdrawn*).

1825-84-U: Peter Galiatsos, (Complainant) v. Local Union #173, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operations of The United States and Canada, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1656-84-M: Local 889 URWA, (Applicant) v. Davidson Rubber Company Limited, (Respondent). (*Withdrawn*).

JURISDICTIONAL DISPUTES

2640-81-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Complainant) v. Yellow Jacket Welding Company Limited; Labourers' International Union of North America, Local 183; International Brotherhood of Boilermakers, Iron Ship Builders; Blacksmiths, Forgers and Helpers, Local Union 128, (Respondents). (*Dismissed*).

0477-84-JD: The Corporation of the City of Etobicoke, (Complainant) v. International Brotherhood of Bricklayers and Allied Craftsmen, Local 2, (Respondent) v. The Borough of Etobicoke Civic Employees, Local Union 1859 (C.U.P.E.), (Intervener #1) v. Masonry Industry Employers Council of Ontario, (Intervener #2). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1901-83-M: Canadian Union of Public Employees and its Local 1582, (Applicant) v. Metropolitan Toronto Library Board, (Respondent). (*Dismissed*).

3075-83-M: St. Catharines Association for the Mentally Retarded, (Applicant) v. Canadian Union of Public Employees and its Local 2276, (Respondent). (*Granted*).

0413-84-M: National Association of Broadcast Employees & Technicians, (Applicant) v. Pathe Video Inc., (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0373-84-OH: Bob Nault, (Complainant) v. Inco Metals, (Respondent). (*Granted*).

1416-84-OH: Ken Evraire, (Complainant) v. The Corporation of the City of Ottawa, (Respondent). (*Withdrawn*).

1484-84-OH: Mark Harvey, (Complainant) v. John Ziner Lumber Ltd., (Respondent). (*Dismissed*).

1707-84-OH: Ernest Lawrence, (Complainant) v. Zettel Manufacturing Limited and Jim Inch, (Respondents). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCE

0005-83-M: International Union of Elevator Constructors, (Applicant) v. National Elevator and Escalator Association and Northern Elevator Limited and Northern Elevator Service Limited, (Respondent). (*Withdrawn*).

1610-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Lavern Construction Co. Ltd. and 506162 Ontario Ltd., carrying on business as LCM Developments Ltd., (Respondents). (*Granted*).

1611-83-M; 1612-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. D.K. Construction Ltd., (Respondent). (*Withdrawn*).

1631-83-M: The Built-Up Roofers' Damp and Waterproofers' Section of the Ontario Metal Workers' Conference, (Applicant) v. Heather and Little Company Limited, (Respondent). (*Withdrawn*).

2908-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Reimer Overhead Doors Ltd., (Respondent). (*Granted*).

0037-84-M: Sheet Metal Workers' International Association, Local 30, (Applicant) v. Phoenix Roofing & Waterproofing Ltd., (Respondent). (*Granted*).

0188-84-M: International Union of Bricklayers and Allied Craftsmen, Local Union No. 9, (Applicant) v. The Brant County Board of Education, (Respondent). (*Granted*).

0335-84-M: Sheet Metal Workers' International Association Local Union 537, (Applicant) v. Philip Doyle Limited, Philip Doyle Mechanical Inc., and Philip Doyle Manufacturing, (Respondents). (*Withdrawn*).

0611-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lorbel Developments Limited, Carrying on business as Canada Homes, (Respondent). (*Withdrawn*).

0647-84-M: Ontario Allied Construction Trades Council, (Applicant) v. Electrical Power Systems Construction Association, (Respondent). (*Withdrawn*).

0779-84-M: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Old King Painters Ltd. and Regina Campoli and Anna Sallati, carrying on business under the name and style of Princes Painting, (Respondents). (*Granted*).

0800-84-M: Ontario Allied Construction Trades Council on its own behalf and on behalf of United Brotherhood of Carpenters and Joiners of America, Local 2222, (Applicant) v. Electrical Power Systems Construction Association and C.M. Robertson Enterprises Ltd., (Respondents). (*Withdrawn*).

0857-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Baragar Mechanical Installation, (Respondent). (*Dismissed*).

0880-84-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Loed Contractors, A Division of 554700 Ontario Limited, (Respondent). (*Granted*).

0908-84-M: Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Servais Sheet Metal Ltd., (Respondent). (*Granted*).

0957-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Local 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ellis-don, (Respondent). (*Granted*).

0973-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. St. Catharines Concrete Forming, (Respondent). (*Withdrawn*).

0974-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Flag Construction, (Respondent). (*Withdrawn*).

1034-84-M: Sheet Metal Workers International Association, Local 285, (Applicant) v. Applewood Air-Conditioning Limited, Applewood Air-Conditioning (Ottawa) Limited, (Respondents). (*Granted*).

1144-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. The Board of Governors of Exhibition Place and The Municipality of Metropolitan Toronto, (Respondents). (*Granted*).

1161-84-M; 1162-84-M; 1163-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Le Brun Constructors Ltd., (Respondent). (*Withdrawn*).

1232-84-M: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Hespeler Concrete Floors Limited, (Respondent). (*Granted*).

1282-84-M: Labourers' International Union of North America, Local 527, Dalacoustic Contractors Ltd., (Respondent). (*Withdrawn*).

1348-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Bandiera & Associates Ltd., (Respondent). (*Withdrawn*).

1356-84-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. George Stone & Sons Ltd., (Respondent). (*Withdrawn*).

1358-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 71, (Applicant) v. Roy Goodfellow Plumbing and Heating Ltd., (Respondent). (*Terminated*).

1394-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Bot Construction (Canada) Limited, (Respondent). (*Withdrawn*).

1419-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Dimarco Plumbing and Heating Co. Ltd., (Respondent). (*Withdrawn*).

1528-84-M: United Brotherhood of Carpenters and Joiners of America, Local 18, (Applicant) v. Coldmatic-Refrigeration of Canada Ltd., (Respondent). (*Granted*).

1543-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. C. & F. Gatto Carpentry Contracting Ltd., operating as Ashton Carpentry, (Respondent). (*Granted*).

1624-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 4, (Applicant) v. Fals Masonry Ltd., (Respondent). (*Granted*).

1635-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 7, (Applicant) v. DMA Masonry Limited, (Respondent). (*Terminated*).

1636-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Kipling Paving Company Limited, (Respondent). (*Withdrawn*).

1642-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Gamen Paving Construction Ltd., (Respondent). (*Withdrawn*).

1643-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Unidrain Construction Ltd., (Respondent). (*Withdrawn*).

1674-84-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 765, (Applicant) v. Richard's Steel Ltd., (Respondent). (*Granted*).

1685-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Ralph M. Moore Industrial Installations, (Respondent). (*Withdrawn*).

1694-84-M: The United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. J. A. MacDonald Ltd., (Respondent). (*Withdrawn*).

1708-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Dufferin Construction Company, (Respondent). (*Withdrawn*).

1711-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Jacko & Burtnyk, (Respondent). (*Withdrawn*).

1724-84-M: Resilient Floorworkers, Local Union 2965, (Applicant) v. Zeppa Tile Inc., (Respondent). (*Withdrawn*).

1730-84-M: Labourers' International Union of North America, Local 506, (Applicant) v. The Toronto Construction Association Richway Construction Ltd., (Respondent). (*Withdrawn*).

1731-84-M; 1732-84-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades and Glazier & Metal Mechanics Local 1795 of the International Brotherhood of Painters & Allied Trades, (Applicant) v. Campbell Glass Limited, (Respondent). (*Withdrawn*).

1745-84-M: Resilient Floorworkers, Local Union 2695, (Applicant) v. Calibre Enterprises Limited, (Respondent). (*Withdrawn*).

1750-84-M: International Brotherhood of Electrical Workers Local Union 353 Member of I.B.E.W., C.C.O., (Applicant) v. L. G. Barrett Electric Ltd. 140 Finchdene Square, Unit 2, SCARBOROUGH, Ontario. M1X 1B1, (Respondent). (*Granted*).

1770-84-M: The Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

1772-84-M: Laborers' International Union of North America, Local 607, (Applicant) v. Gateway Building and Supply Limited, (Respondent). (*Withdrawn*).

1778-84-M: Millwrights District Council of Ontario on behalf of Local 1916, (Applicant) v. Daniel Steel Installation and Burlington Steel Erectors Ltd., (Respondent). (*Granted*).

1786-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Ambler-Courtney Limited, (Respondent). (*Withdrawn*).

1792-84-M: International Brotherhood of Electrical Workers Union, Local 353, (Applicant) v. Paynell Electric, (Respondent). (*Granted*).

1793-84-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, (Applicant) v. Taunton Fabricating Ltd., (Respondent). (*Granted*).

1794-84-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721, (Applicant) v. Dundas Iron & Steel Limited, (Respondent). (*Granted*).

1819-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Ambler-Courtney Limited, (Respondent). (*Withdrawn*).

1831-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. XDG Limited, (Respondent). (*Withdrawn*).

1832-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Refflinghaus Construction Company Limited, (Respondent). (*Withdrawn*).

1837-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Roman Plastering & Acoustical Co., (Respondent). (*Granted*).

1842-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. J. A. MacDonald (London) Limited, (Respondent). (*Withdrawn*).

1843-84-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Doug Wright Construction Limited, (Respondent). (*Withdrawn*).

1871-84-M: International Union of Elevator Constructors, Local 50, (Applicant) v. Canadian Escalator and Elevator Service Company Limited, (Respondent). (*Withdrawn*).

1944-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. Joe Kiss — Sky Scraper Crane Rentals, (Respondent). (*Withdrawn*).

1964-84-M: International Union of Operating Engineers, Local 793, (Applicant) v. G. C. Romano Sons (Toronto) Ltd., (Respondent). (*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1321-83-R: Claude Mongeon, (Applicant) v. The Canadian Union of Public Employees, (Respondent) v. Cochrane-Iroquois Falls District Roman Catholic Separate School Board, (Intervener). (*Denied*).

2282-83-U: Abdul Chafchak, (Complainant) v. United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. and its Local 195, (Respondent) v. Central Stampings Limited, (Intervener). (*Denied*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778



Ontario
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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1984] OLRB REP. DECEMBER

EDITOR: NIMAL V. DISSANAYAKE

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Typeset, Printed and Bound by Union Labour in Ontario

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Unfair Labour Practice — Duty of Fair Representation — Reconsideration — Prior decision refusing late request to amend complaint — Dismissing for failure to disclose prima facie case — Circumstances where reconsideration appropriate reviewed — Application denied

O. J. PIPELINES LTD.; RE JOHN (JACK) JAMES; RE LABOURERS' UNION AND ITS LOCALS 493 AND 527 1737

2295-84-R Ballycliffe Lodge Limited, Applicant, v. Her Majesty The Queen in Right of Ontario, Respondent

Practice and Procedure — Related Employer — Applicant seeking declaration that applicant and crown related employers — Application denied as crown not bound by *Labour Relations Act*

BEFORE: Ian C. Springate, Alternate Chairman, and Board Members I. M. Stamp and P. V. Grasso.

APPEARANCES: *Michael Gordon, Thomas Stefanik, John Newton, Ivan Irwin and Rowena Kerr for the applicant; Leslie M. McIntosh for the respondent; Naomi Duguid, Doug Anderson and Dorothy Kent for Service Employees International Union, Local 204; Barry H. Bresner and Robert Butler for Medox Health Care Services, a division of Drake International Inc.; Peter J. Thorup and Valerie Owen for Valmed Health Services Inc.*

DECISION OF THE BOARD; December 21, 1984

1. The name of the respondent in the style of cause of this application is amended to read: "Her Majesty The Queen in Right of Ontario".

2. This is an application under section 1(4) of the *Labour Relations Act* in which the applicant seeks a declaration that it is under the direction and control of the Crown in Right of Ontario (the "Crown") and that the applicant and the Crown are related employers for the purposes of the *Labour Relations Act*. The applicant further seeks a declaration that the Crown is bound by a collective agreement entered into between the applicant and Service Employees International Union, Local 204.

3. The Crown challenges the jurisdiction of the Board to deal with this application, contending that the *Labour Relations Act* does not bind the Crown. In support of this position the Crown relies on section 11 of the *Interpretation Act* which states:

No Act affects the rights of Her Majesty, Her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

There is no such statement in the *Labour Relations Act*.

4. Having regard to the provisions of section 11 of the *Interpretation Act*, we are satisfied that the *Labour Relations Act* is not binding on the Crown. It follows that this Board has no jurisdiction to either find the Crown to be a related employer with the applicant under section 1(4) of the *Labour Relations Act*, or to declare the Crown to be bound by a collective agreement. Accordingly, these proceedings are hereby terminated.

5. At the hearing into this matter counsel for Ballycliffe Lodge Limited indicated that the firm might take the position that it is an agent of the Crown, and accordingly not bound by the provisions of the *Labour Relations Act*. In that such a contention would go to the Board's jurisdiction to make findings and orders affecting Ballycliffe Lodge Limited, the Board is prepared to inquire into the issue. The Board will do so, however, only after the completion of the matters raised in Files 1909-83-U, 1913-83-U and 2374-84-R. If, with respect to those

matters, the Board concludes that it would be appropriate to make some finding or order affecting Ballycliffe Lodge Limited, then the Board will entertain an argument by Ballycliffe Lodge Limited that it is an agent of the Crown.

2156-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Beacon Vanier Taxi(1984) Co. Ltd.** Eastway Taxi Bob Labrie Taxi, Respondents

Bargaining Unit — Dependent Contractor — Employer — Related Employer — Dispute whether broker or car owners real employer of taxi drivers — Evidence of joint control — Board applying related employer provision — Finding mixed unit of employees and dependent contractors appropriate where latter content to be so included

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: *Frank Reilly for the applicant; no one appearing for the respondents.*

DECISION OF THE BOARD; December 18, 1984

1. The name of one of the respondents is amended to read: Beacon Vanier Taxi (1984) Co. Ltd.
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. In this application for certification the union seeks to represent a group of drivers and owner-operators engaged in the taxi business in Ottawa, Ontario. The application raises a variety of problems. The applicant union submits that the three respondents should be treated as one employer pursuant to section 1(4) of the *Labour Relations Act*; moreover, there is also a question concerning the description of the appropriate bargaining unit. This problem arises because of the uncertain status of certain "owner-operators" who may be "dependent contractors" within the meaning of section 1(1)(h) of the Act. Under section 6(5), dependent contractors are entitled to their own separate bargaining unit and may only be included in a "mixed unit" with other employees if there is evidence to satisfy the Board that a majority of the dependent contractors wish to be included in such "mixed unit". Finally, there is a question as to the identity of the "real employer" of these individuals — hence the union's submission that, in substance, the three business entities named as respondents should be treated as one employer for the purposes of the Act.
5. Notice of this application and of the hearing, in Form 4, was served upon each of the named respondents. That notice specifically indicates that there would be a hearing before the Board, in Toronto, on November 30, 1984, and that the purpose of the hearing is "to hear

the evidence and representations of the parties with respect to all matters arising out of and incidental to, the application". The respondents are advised that:

IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

6. In response to the application and notice of hearing, the respondent Beacon Vanier Taxi (1984) Co. Ltd. filed a reply and a Form 74 Declaration indicating that notice to employees of the application had been posted in conspicuous places where such notice would most likely come to the attention of all employees who might be affected by the application. Beacon's reply asserted that it had no drivers in its direct employ.

7. Eastway Taxi did not file a reply. However, Mr. Ouellett, its "president", also filed a declaration of posting in Form 74, and executed a waiver of hearing form in which, on behalf of Eastway, he consented to the Board issuing a decision in this matter based upon the material filed without a hearing. Bob Labrie Taxi (said to be correctly described as "Robert Labrie") filed a reply but did not indicate any position with respect to the request for a section 1(4) declaration, or anything else.

8. When the matter came on for a hearing before the Board on November 30, 1984, no one appeared on behalf of any of the named respondents. The applicant union was caught somewhat by surprise. It had anticipated their appearance — particularly in light of its request for the application of section 1(4) of the Act, and section 1(5), which reads as follows:

(5)Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

The Board waited, for a time, to see if the respondents were simply late, then, on the union's request, heard the union's evidence and representations — which, in the circumstances, were uncontradicted and unopposed.

9. A good deal of that evidence was impressionistic or based upon hearsay, and while the Board is entitled to admit and rely upon such evidence (see section 15 of the *Statutory Powers Procedures Act*), we are not entirely sanguine about doing so. On the other hand, the applicant union and the Board have been put in that position solely because none of the respondents saw fit to appear at the hearing — despite the express warning (in bold type) on the notice of hearing which they obviously received. Given that express warning, and the fact that time is of the essence in certification matters, the union was entitled to, and eventually did insist upon proceeding in the respondents' absence — waiving its right to rely upon section 1(5) and "taking a chance" that its own (unrebutted) evidence would be sufficient to tip the balance in its favour. Nevertheless, the Board is troubled by the absence of more precise evidence concerning the commercial relationship between the named respondents. The situation would have been much clearer if they had attended at the hearing.

10. The union's chief witness was Larry Phalen, who testified that he has a number of years' experience in the taxi industry. He told the Board that the taxi business involves three

kinds of "players": a "broker" who runs a dispatch service accepting calls from customers for cars which may be owned or driven by others; "owners" who own the cabs, either outright or pursuant to a hire purchase, installment payment, or rental agreement; and "drivers" who are licenced to operate the cabs. The driver is dependent upon the owner who supplies the vehicle and the broker who supplies dispatch and related services. In the instant case, the "broker" is Beacon Vanier, the apparent owners of most of the cabs are either John Ouellett carrying on business as Eastway, or Bob Labrie. There are also several drivers who own their own cab and have a direct relationship with Beacon Vanier but none with Eastway or Labrie.

11. Phalen testified that, to the best of his knowledge, Beacon Vanier owns the dispatch system, certain building facilities, and the taxi licence plates attached to all the vehicles. Beacon Vanier controls those taxi licences which are necessary for the automobile to operate as taxicab. Ouellett and Labrie each own a fleet of cars and, with Beacon Vanier's approval, recruit drivers to run them. Such persons recruited by Ouellett or Labrie (acting as "middle men") must sign a contract directly with Beacon Vanier. Phalen put in evidence a copy of a contract between Pete Seguin and Beacon-Vanier Taxi Rental & Service Ltd. which reads as follows:

THIS AGREEMENT MADE in duplicate this
17th day of Aug., 1984.

Between:

BEACON-VANIER TAXI RENTAL & SERVICE LTD
(herein after [sic] called the "Company")

of the First Part,

and —

name Pete Seguin

(herein after [sic] called the "Contractor")

of the Second Part

WHEREAS the Company carries on the business of providing a taxi service under the firm name and style of Beacon-Vanier Taxi Rental & Service Ltd. and the said business is conducted by means of a call dispatch system run by the Company and through taxi contracts by the Company.

AND WHEREAS the Contractor has requested that the Company allows him to pay stand rent for his own purposes including use in his employment.

The Contractor hereby agrees to pay the Company the sum of \$45.00 for each day Stand rent. The Contractor using his own vehicle in his employment shall be responsible to carry his own coverage of C.P.P., U.I.C., and other matters. The Company's responsibility shall be limited to Dispatch Calls.

This agreement may not be assigned without the written consent of the Company.

This agreement shall ensure to the benefit of and be binding upon the heirs; executors, successors and assigns.

In witness whereof the Company has hereunto affixed its Corporate Seal, attested by the hands of its proper officer and the Contractor has hereunto set his hand and Seal.

Beacon-Vanier Taxi Rental & Service Ltd.

“John P. Ouellett”

The Contractor “P. Seguin”

It will be seen that the document establishing a contractual relationship between Seguin and Beacon-Vanier, and providing for the payment of certain “stand rent” is signed on behalf of Beacon-Vanier by John Ouellett, the principal of Eastway.

12. The system seems to be that the driver pays a fee to Ouellett for the vehicle, equipment and dispatch services, and Ouellett, in turn, pays a portion of that fee to Beacon-Vanier. The witness did not know the precise relationship between Ouellett and Beacon Vanier. The drivers work through either Eastway (Ouellett) or Labrie. They do not interchange. The drivers regard themselves as being employed by both Beacon Vanier *and* Eastway (Ouellett) or Labrie. Phalen did not know the details of the relationship between Beacon Vanier and the five owner-drivers.

13. The drivers depend for the majority of their calls and, hence their income, upon the dispatch services provided by Beacon Vanier. Beacon Vanier has rules respecting driver appearance, courtesy, and promptness. The drivers must conform to those rules. Customer complaints are directed to Beacon Vanier. Driver discipline is maintained by Beacon Vanier's dispatcher who has the authority to discipline drivers by refusing them calls. Beacon Vanier may also refuse dispatch services to drivers who have not remitted their daily fees through Ouellett.

14. Beacon Vanier has a charge or “chit” system available to its regular customers. Those chits bear Beacon Vanier's name. Upon receipt from a customer, the driver can give the chit to Ouellett for reimbursement, can approach Beacon Vanier directly, or can tender a series of chits in satisfaction of the prescribed daily stand rent.

15. Although, as we have already noted, there are at least five individuals who own their own vehicle and have no direct relationship with Ouellett or Labrie, the union drew no such distinction during its organizing campaign. Each driver was approached at or in his vehicle and invited to sign a membership card which reads as follows:

I hereby request and accept membership in the Retail, Wholesale and Department Store Union and promise to abide by the Bylaws of the union and the Constitution of the International Union. I authorize the union to

represent me in any negotiations concerning wages, hours, and working conditions with my employer.

These cards were signed in group situations, which included both drivers and owner-operators, or following a meeting which likewise included both categories of driver. There is no evidence that the drivers drew any distinction, nor that the owner-operators, when they signed their cards, had any objection to being included for bargaining purposes in a unit along with their fellow drivers. On the contrary, Harry Ghadban (a union official) described an incident in which all of the drivers engaged in a work stoppage (subsequently settled) because some of their number had been “disciplined” by denying them access to the dispatch services. All of the drivers, including the owner-operators, participated in this work stoppage in a demonstration of solidarity. At the time the owner-operators indicated that they were prepared to support their fellow drivers because they were “all in this together” and had to “stick together”. None of the individual owner-operators responded to the notice of this application to indicate opposition to a mixed unit. In summary, the only evidence before the Board suggests that if the owner-operators are considered as “dependent contractors”, they are content to be included in the same bargaining unit as the other drivers.

16. Section 1(4) of the Act reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

17. Section 1(4) was enacted in 1971, and deals with situations where the economic activity giving rise to the employment or collective bargaining relationships regulated by the Act, is carried out by or through more than one legal entity (several individuals, companies, a joint venture, etc.). Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil or treat the entities, which at common law are legally separate, as one employer for the purposes of the Act. Section 1(4) ensures that the representational rights of the union and its members will attach to a definable commercial activity rather than the particular legal vehicles through which that activity is carried on. Legal form is not permitted to dictate or fragment what would otherwise be a coherent bargaining structure; nor will alterations in such legal form undermine established bargaining rights. Frequently, section 1(4) is invoked to preserve established bargaining rights which might otherwise be eroded by a change in the legal identity of the employer and the application of the common law notion of privity of contract. But it may also be invoked on a certification application where the evidence suggests not only related activities, but a form of joint control over important aspects of the employment relationships which would be the subject of collective bargaining. Section 1(4) avoids the difficulties which can sometimes arise in identifying “the real employer” of a group of employees. Of course, section 1(4) is discretionary. Even if its prerequisites are established, the Board need not apply it where there is no sound collective bargaining reason for doing so — for example, where ascribing bargaining rights to one of the related entities could be done without posing problems for bargaining or

collective agreement administration stemming from the uncertainty as to the identity of the true employer with whom the union must bargain and who will exercise the statutory and contractual rights established by the Act.

18. There is no doubt in the instant case that the respondents are engaged in related activities or businesses. The employees are certainly under the common control and direction of the respondents; moreover, Eastway and Labrie certainly appear to be acting under the direction of or as agent for Beacon Vanier. Whether, in law, Ouellett is an employee of Beacon Vanier payable by some form of commission, or an independent contractor acting on his own behalf and also on behalf of Beacon Vanier, the fact is that he appears to have signing authority for the latter firm. (See the contract mentioned above.) Indeed, many of the indicia of control would suggest that it is Beacon Vanier rather than Ouellett or Labrie who is the "real employer" of the individuals whom the union seeks to represent — even though Ouellett and Labrie may also have certain authority to hire or fire subject to Beacon Vanier's approval. Be that as it may (and noting the difficulties with the evidence mentioned above), there is certainly a *prima facie* case for a 1(4) declaration and no reason advanced by the respondents why it should not be granted.

19. Having regard to the foregoing, the Board finds and declares that the respondents are to be treated as one employer for the purposes of the Act. The Board further finds that the unit of employees appropriate for collective bargaining should be a "mixed unit" consisting of all drivers and owner-operators of the respondent(s) licenced by the Municipalities of Gloucester and Vanier in the Ottawa-Carleton region, save and except dispatch staff, supervisors, fleet owners, and persons above the rank of dispatch staff, supervisors, and fleet owner".

20. There is some considerable discrepancy between the number of employees that the union claims are in the above-described unit and the number identified by the respondents in their replies. However, it appears that regardless of the resolution of this dispute concerning the precise composition of the bargaining unit, more than fifty-five per cent of the employees of the respondent, at the time the application was made, were members of the applicant on November 20, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. Accordingly, pursuant to section 6(2) of the Act, the union will be certified on an interim basis in respect of the bargaining unit set out in paragraph 18 above. A formal certificate must await a resolution of the dispute concerning the precise composition of the bargaining unit. To this end, the Board hereby appoints an Officer to inquire into the employee lists and composition of the bargaining unit and to report to the Board with respect to this matter.

2249-84-JD Labourers' International Union of North America Local 1036, Complainant, v. **Bird Construction Company Limited** United Brotherhood of Carpenters and Joiners of America Local 446 Gilbert Scott and Gerry Thibodeau, Respondents

Jurisdictional Dispute — Union engaging in strike and forcing employer to change work assignment — Arguing strike no longer “imminent” since union now having assignment to its liking — Board considering policy of preventing resort to strikes as means of resolving jurisdictional disputes — Giving liberal interpretation to s. 91(8) and departing from prior decision — Interim order extraordinary remedy requiring balancing of policies — Interim order issued in particular circumstances

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. Wilson and B. L. Armstrong.

APPEARANCES: *B. Fishbein, J. Lewis, R. Dauphin and T. Connolly for the applicant; J. J. Nyman, G. Scott and Karl Ball for United Brotherhood of Carpenters and Joiners of America Local 446, Gilbert Scott and Gerry Thibodeau; G. Grossman and John Martin for Bird Construction Company Limited.*

DECISION OF THE BOARD; December 7, 1984

1. The Board issued the following interim order pursuant to section 91(8) of the *Labour Relations Act* in a decision which issued November 23, 1984:

The Board directs that the respondent Bird Construction Company Limited perform with a composite crew all work in connection with the stripping of concrete forms, including the releasing, dismantling and relocating of such concrete forms to the next point of usage or point of storage at its project in Sault Ste. Marie in the same manner as was being done prior to November 13, 1984.

2. The respondents United Brotherhood of Carpenters and Joiners of America Local 446, Gilbert Scott and Gerry Thibodeau challenged the Board's jurisdiction to entertain the request for an interim order on the grounds that the statutory pre-conditions of section 91(8) were not made out by the alleged facts. The respondent Bird Construction Company Limited did not challenge the Board's jurisdiction, but requested the Board to exercise its discretion and not issue the order. The applicant adopted the position that the Board had jurisdiction and should issue the order.

3. The facts as alleged in the complaint and augmented by agreement of the parties during the consultation are as follows:

(1) The work alleged to be in dispute is all work in connection with the stripping of concrete forms, including the releasing, dismantling and relocation of such concrete forms to their next place of usage or storage at the project.

(2) The respondent Bird Construction Company Limited (“the company”)

was performing concrete forming construction on a water reservoir in Sault Ste. Marie, Ontario. On February 14, 1984, Bird held a pre-job mark-up meeting to deal with questions of work assignment to the various trades on the project. At the end of that meeting the complainant Labourers' International Union of North America, Local 1036 ("Local 1036") and the respondent United Brotherhood of Carpenters and Joiners of America, Local 446 ("Local 446") were in dispute respecting the stripping of forms.

(3) As time approached for the disputed work to be performed, Bird asked the two unions to submit their precedents on which their claims for the work were based. The dispute was not resolved.

(4) The employer began performing some of the disputed work in mid-August, 1984 with a composite crew of labourers and carpenters in the absence of any resolution of their dispute.

(5) The respondent Gerry Thibodeau, a steward of Local 446, complained to the Company in the morning of November 12th about the composite crew arrangement. The company told Thibodeau that it would continue to perform the work with a composite crew. Later that morning, the carpenters employed by the company on the project did not return to work from their morning rest break. When they were directed by the company's general foreman to return to work, they left their job, took their tools with them and assembled outside the project.

(6) At a meeting which began that same morning on the project attended by representatives of the company and the business managers and stewards of both Locals, the company requested the business manager of Local 446 to have the carpenters return to work. The carpenters returned to work and the meeting continued for the remainder of the day. There was no resolution of the dispute and the company sought but failed to obtain assurance from the business manager of Local 446 that the carpenters would remain on the job. Absent that assurance and any resolution of the dispute, the company told the other parties that it would assess its position overnight.

(7) On November 13th, the company ceased performing the disputed work with composite crews and instead assigned specific elements of the work to each of Locals 1036 and 446.

(8) Local 1036 filed this complaint on November 15th.

4. The sections of the Act relevant to this complaint provides as follows:

"91.-(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons

in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

• • •

(8) Where a complaint is made under subsection (1) and the complainant alleges that a strike is imminent or is taking place by reason of the requirement as to the assignment of work or by reason of the assignment of work, the Board may, after consulting any employer, employers' organization, trade union or council of trade unions that in its opinion is concerned, make such interim order with respect to the assignment of the work as it in its discretion considers proper.

(9) The Board may in an interim order or direction or at any time after the making of such interim order or direction direct any person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents to cease and desist from doing anything intended or likely to interfere with the terms of an interim order or direction respecting the assignment of work."

5. Counsel for the respondents Local 446, Scott and Thibodeau contends that the Board lacks jurisdiction under section 91(8) of the Act because the two pre-conditions requisite to the issuing of an interim order are not met on the facts alleged in the complaint. Counsel argues that, even if the Board finds that there was a strike of carpenters on November 12th, it could not infer from that fact that a strike is imminent with respect to the work assignment which is the subject matter of the complaint. Counsel cites as authority for that interpretation of the section the Board's decision in *Beer Precast Concrete Limited*, [1970] OLRB Rep. Feb. 1400. The alleged facts in that case were as follows. Beer had assigned to members of the labourers union the work involved in erecting pre-cast concrete architectural units on a building project. The general contractor on the project was threatened with an unlawful strike of rodmen employed on the project and represented by the ironworkers union. The general contractor directed *Beer* to assign two members of the ironworkers to perform the work involved in the erection of the precast concrete architectural units. Beer complied with the request. The labourers filed a complaint under section 66 of the Act, the predecessor to section 91, in which it requested an interim order under subsection 2 of section 66. The wording of section 66(2) was identical to the wording in the present subsection 8 of section 91. The Board gave the following reasons for finding that it lacked jurisdiction to issue an interim order in the matter:

"The complainant has alleged that a strike is imminent on the part of Local 721 by reason of the original assignment made by Beer, that is, the assignment to members of the complainant of work involved in the erection of precast concrete architectural units. The complainant, however, did not allege that a strike is imminent or taking place by reason of the work assignment which is the subject matter of this dispute, namely the assignment of two members of Local 721 to do work involved in the erection of precast concrete architectural units. Moreover, counsel for Local 721 advised the Board that no strike is imminent on the part of Local 721 by reason of the present work assignment." (emphasis added)

6. A fundamental principle underlying both mechanisms for voluntary resolution of work assignment disputes and statutory mechanisms for their adjudication is that a party should not gain jurisdiction by threatening or engaging in work stoppages. In other words, striking or threatening a strike to obtain the assignment of work cannot be rewarded as successful behaviour. Thus, if work is obtained by striking, including threatening a strike, the adjudicator will normally restore the situation which existed prior to the strike until the merits of the dispute are determined. That is an understood and accepted fact of life in the construction industry in the United States and Canada. This principle has been the cornerstone of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry as it has been administered by the Impartial Jurisdictional Disputes Board and its predecessor the National Joint Board for the Settlement of Jurisdiction Disputes in the Construction Industry. The elimination of work stoppages as a response to work assignment disputes is a key objective of such voluntary and statutory mechanisms for the resolution of those disputes.

7. Serving that objective, in the Board's view, calls for a liberal interpretation of section 91(8) of the Act, not the narrow one taken by the Board in *Beer Precast, supra*. The Board notes that, since *Beer Precast*, the Board's jurisdiction has been expanded under section 91(1) in respect of the persons who can be made parties to a complaint under section 91. Under the predecessor section 66(1), the Board did not have jurisdiction to hear a complaint unless the employer involved was employing members of the disputing unions, trades, crafts or classes of employees. See, *R. v. Orliffe, ex p. Can. Pittsburgh Industries Ltd.*, [1961] O.W.N. 223, 61 CLLC ¶15,373 (Ont. H.C.). That limitation was eliminated when the present wording of section 91(1) was adopted by the 1970 amendments to the Act. The obvious purpose of the amendment was to give the Board broader jurisdiction to deal with work assignment disputes.

8. To construe section 91(8) the way counsel for Local 446 argues in the fact situation alleged in the complaint would be to deny the objective of making work stoppages an unacceptable means of dealing with work assignment disputes. In the Board's view, in interpreting "... a strike is imminent ... by reason of the requirement as to the assignment of work ..." in subsection 8, the Board ought to look at the overall context of the dispute. This is because a request for an interim order under subsection 8 is made only "[w]here a complaint is made under subsection 1 ...". A complaint made under subsection 1 is a complaint that "... a trade union ... or an officer, official or agent of a trade union ... was or is requiring an employer ... to assign particular work to persons in a particular trade union ...". Where those conditions exist, the Board is given discretion to inquire into the merits of the complaint. Thus there is a statutory presumption that the complaint on which the subsection 8 request for relief is founded will proceed on its merits. When the Board hears it on its merits, the Board will focus on the context of the work in dispute and the basis of the competing claims for the work. It does not take the narrow view of the Board in *Beer Precast, supra*, and focus only on the assignment existing at the moment the complaint was triggered. There is nothing in the wording of subsection 8 insofar as the work in dispute is concerned, in the Board's view, which either would require or justify the Board to consider the work in dispute within a narrower context when interpreting that subsection. Rather, since the request for relief under subsection 8 originates with a complaint about particular work which would give the Board jurisdiction under subsection 1 to deal with the complaint on its merits, it makes sense that the Board would interpret subsection 8 within the same context of the work in dispute as when it is dealing with the same complaint on its merits under subsection 1. Thus, the dispute here is work in connection with the stripping of concrete forms.

9. Both Local 1036 and Local 446, the competing unions, claimed the work and, although an assignment was made to a mixed crew, three months later Local 446 engaged a strike. The members of Local 446 returned to work but its officials *gave no assurances that the members would continue to work* under the mixed crew arrangement. As a result, there remains the imminent threat of a strike by Local 446 over the crew composition for the stripping of concrete forms. It is not sufficient for Local 446 to say that its members will not now strike because the assignment has been changed to their liking. That would simply be saying that the members of Local 446 will not strike again because, by striking they now have the work that they wanted. In fact, the work in dispute is work in connection with the stripping of concrete forms and the threat of an imminent strike by members of Local 446 remains if the employer returns to using a composite crew of labourers and carpenters. In our view Local 446 is not entitled to shield itself behind the company's decision to change the assignment to suit the members of Local 446 as a result of their strike.

10. Counsel for Local 446 argued also that an interim order is an extraordinary remedy and, because of the operation of section 91(17) of the Act, can limit the otherwise legitimate operation and application of a collective agreement. Therefore, counsel submits, the Board should use caution in relying on public policy considerations when interpreting section 91(8). In making this argument, counsel was relying by analogy on the Board's decision in the *Abe Dick Masonry Limited*, [1972] OLRB Rep. Jan. 74. The Board did express the view in that case that interim orders under section 91(8) are extraordinary remedies and, therefore, caution is called for in exercising discretion under that section. The Board later in the decision also referred to the potential effect of section 91(17) of the Act on the operation of collective agreements and gave some consideration to that in the exercise of its discretion, which was to deny the interim order in that case. The facts of the case are substantially different from this one, but counsel was not relying on the facts, rather he was relying on the principle that the extraordinary nature of the section 91(8) remedy calls for caution. In the Board's view, what is called for is a balancing of two competing policy considerations: not to interfere unnecessarily with the proper operation of valid collective agreements; and the public policy objectives of discouraging work stoppages as a response to work assignment disputes. The facts alleged in this case favour the latter policy.

11. Having regard to all of the foregoing, to the facts alleged in the complaint and to the representations of the parties during the consultation, the Board finds as follows. The walk-out of carpenters on November 12th was a strike within the meaning of section 1(1)(o) of the Act. That fact coupled with the inability or unwillingness of the business manager for Local 446 to assure the company that carpenters would remain at work, satisfies the Board that a strike is imminent. Furthermore, the coincidence of the November 12th strike, the change in work assignment on November 13th and the imminence of a strike further satisfies the Board that a strike is imminent by reason of a work assignment within the meaning of section 91(8) of the Act. Therefore, the pre-conditions are met for the Board to have jurisdiction to issue under that section the interim order set out in paragraph 1 above.

12. Counsel for the company asked the Board, should it find that the pre-conditions were present for the issuing of an interim order, to exercise its discretion and not issue an order requiring the company to resume performing the work in dispute with a composite crew of labourers and carpenters because the composite crew had been a source of what counsel referred to as consistent bickering between the labourers and carpenters, making it an inefficient way of performing the work. Were the Board to give effect to that request, it would result in the maintenance of the assignment made on the heels of the November 12th strike. That would

have been the result had the Board declined jurisdiction as a result of interpreting section 91(8) narrowly to apply only to the work assignment which was the subject matter of the complaint. On the facts as alleged, that end result would benefit the carpenters for their strike to the detriment of the labourers. Those were not proper circumstances in which to decline to issue the order.

13. Since counsel for Local 446, Scott and Thibodeau had given an undertaking that they would comply with the interim order, it is unnecessary for the Board to proceed with the request for a cease and desist direction.

14. The Board also retained jurisdiction in this matter in the event that the parties encountered problems with implementation of the interim order.

15. The Board also has directed the Registrar to list this complaint for a pre-hearing conference. The attention of the parties was directed to the Board's Practice Note #15 "Jurisdictional Dispute Complaints".

**0631-84-R International Union of Operating Engineers, Local 793, Applicant,
v. Cornwall Gravel Company Limited, Respondent**

Certification — Construction Industry — Practice and Procedure — Increase of number of employees subsequent to application date not basis for directing vote — Employees alleging they were not advised cards will be used to apply for certification — Not reason to direct vote where no employee filed petition — Indication that improving benefits would follow certification not misleading to require vote

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. Wilson and L. C. Collins.

APPEARANCES: *E.A. Ford and B. Bertrand for the applicant; D.N. Corbett, D.J. Lang and L. Grant for the respondent.*

DECISION OF THE BOARD; December 3, 1984

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on July 13, 1978, the designated employee bargaining agency is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

3. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause *e* of section 117 shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

4. The Board further finds, pursuant to section 144(1) of the Act, that all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The respondent is a construction company based in the City of Cornwall. The company is active in both the roads and the sewers and watermain sectors of the construction industry. The applicant is a union local with jurisdiction throughout the province, although at present it holds bargaining rights with respect to employees of the respondent only in the Cornwall area. The respondent and the applicant are parties to a collective agreement which covers employees working in the Cornwall area. Pursuant to the terms of this collective agreement, on projects in the Cornwall area the respondent is required to employ only equipment operators who are members of the applicant. In June of 1984 the respondent commenced work on certain road and sewer work in the Ottawa area. Although not required to employ union members in the Ottawa area, the respondent did utilize employees from Cornwall who belonged to the applicant trade union. Initially the respondent employed two members of the applicant on its Ottawa area projects. Two weeks later the number of union members employed in the Ottawa area was up to ten. At the hearing, the respondent indicated that from September onward the number of the applicant's members employed in the Ottawa area would gradually decrease until none were left.

6. On the date of the filing of the application, only two equipment operators were working for the respondent in the Ottawa area, namely, Mr. Gerald McDonnell and Mr. Mansel Spence. Both individuals have been members of the applicant trade union since 1976. In support of

its application for certification the applicant filed evidence of membership with respect to both Mr. McDonell and Mr. Spence. Section 7 of the Act provides that where a trade union has filed evidence of membership on behalf of more than fifty-five per cent of the employees in a bargaining unit at the time the application was filed, the Board may certify the applicant outright. However, the section also provides the Board with a discretion to direct the taking of a representation vote. In the instant case, the respondent contends that the Board should exercise its discretion and direct the taking of a vote.

7. The respondent originally based its submission in favour of the taking of a representation vote on two grounds. The first was that at the time of the filing of the application there had not been a representative number of employees in the bargaining unit. The second ground was based upon a claim that when Mr. McDonell and Mr. Spence signed the membership evidence filed by the applicant, the union did not explain to them that the documents were to be used in support of an application for certification. After both parties had tendered their evidence with respect to these two issues, the respondent raised yet another ground in support of its claim that a vote should be directed. According to the respondent, the evidence indicates that if the union did advise the employees that the documents they were asked to sign would be used to support a certification application, it misled the employees with respect to the consequences of the union being certified.

8. Outside of the construction industry, the Board's general practice is not to certify a union outright where the employer is planning a major build-up of its work force within a reasonable period of time. In such circumstances, the Board will generally direct that a representation vote be taken at a time when there is substantial and representative number of employees at work. See, *F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846. With respect to applications for certification in the construction industry, however, the Board has generally not followed this approach. Because of the transitory nature of construction work and the shifting of employees from one job site to another, the Board has a general practice of concerning itself only with employees actually at work on the date of the making of the application. Under this approach, the Board does not take into account either work force build-ups or layoffs after the application date. See, *Northern Construction Company* [1966] OLRB Rep. July 261. This practice is supported by section 119(2) of the Act which states that with respect to construction industry certification applications "the Board need not have regard to any increase in the number of employees in the bargaining unit after the application was made". In the instant case, the respondent's pattern of employment in the Ottawa area, namely a rapid build-up of employees to a peak and then a gradual reduction, is not particularly unusual for the construction industry and we do view it as an appropriate basis for departing from the Board's general practice with respect to construction industry certification applications. Accordingly, we do not view the increase in the number of employees subsequent to the date of the filing of the application as an appropriate basis for directing the taking of a representation vote.

9. We turn now to deal with the respondent's claim that the employees were not advised that the membership evidence they were asked to sign would be used to support an application for certification. The membership evidence filed by the applicant is in the form of two documents headed up "proof of membership document". The document filed with respect to Mr. McDonell is set out below. The document filed with respect to Mr. Spence is identical in form.

International Union of Operating Engineers
Local 793
205 Church Street, Toronto, Ontario M5B 1V9

PROOF OF MEMBERSHIP DOCUMENT

(*1) TO WHOM IT MAY CONCERN:

I, Gerald McDonell REGISTER #1688284 have been a member of the International Union of Operating Engineers, Local 793, since May 1976, Month Year and I am at present a member in good standing and wish the International Union of Operating Engineers, Local 793 to represent me for the purpose of collective bargaining. My monthly dues of \$16.50 are paid for June, 1984.

Cornwall Gravel Company Limited (*2)
(Employer)

419-157-854
(Social Insurance Number)

Dozer — loader
(Classification of Work)

("G. McDonell")
(Signature)

June 1, 1984
(Date)

(*3) FOR TORONTO OFFICE USE ONLY

This is to certify that Brother Gerald McDonell has been a member in good standing of Local 793, International Union of Operating Engineers, since 5/31/76 and is a member in good standing at the present time.

("E. A. Ford")
(Signature)

Amended — June 6th, 1984
Aug. 28/78 (Date)

***N.B.

*1 — Must be filled in completely by Union Office or Business Representative before member signs.

*2 — Member to sign and date only after #1 filled in

*3 — to be filled in by Toronto Office only after #1 & #2 completed.

10. Mr. McDonell and Mr. Spence both signed the proof of membership documents at the request of Mr. Phil Bertrand, a business representative of the applicant well known to both employees. Mr. Bertrand testified that he had advised both employees that the documents would be used to support a certification application. Both Mr. McDonell and Mr. Spence, however, denied that such was the case. Both employees testified that Mr. Bertrand had advised them that the documents indicated that they were members in good standing of the union and that their union dues were paid up to date. Both employees acknowledged that they had not paid close attention to the wording of the documents. According to Mr. Spence, he assumed that he was being asked to sign a form similar to the one he signed every year authorizing his employer to deduct union dues from his wages. Both Mr. Spence and Mr. McDonell testified that they were surprised when they later learned that the applicant had filed an application for certification. Both employees indicated that subsequent to the filing of the application they were telephoned by the respondent's job superintendent who indicated that he was displeased with what had occurred. It is of interest that the Board mailed a copy of Form 78 to both employees, advising them of the application and noting the procedure by which an employee could file a statement of desire in opposition to the application. However, neither employee filed a statement in opposition to the application or in any way indicated that they desired to oppose the application. Both employees testified at the Board hearing pursuant to summonses issued to them by the respondent.

11. Pursuant to section 7 of the Act, the procedure by which a union demonstrates its entitlement to be certified is by demonstrating that employees in that bargaining unit are members of the union. It is not disputed that at the relevant time both Mr. Spence and Mr. McDonell were members of the applicant trade union, and had been since 1976. The documents they were asked to sign reflected this fact. Although it was not necessary that they do so, the documents also contained the statement that "I . . . wish the International Union of Operating Engineers, Local 793 to represent me for the purpose of collective bargaining". Although neither Mr. McDonell nor Mr. Spence paid close attention to the wording of the document, it is not alleged that they were prevented from doing so. Further, had it been the case that the two employees did not wish to be represented by the applicant in the Ottawa area, they could have filed a timely statement of desire in opposition to the application. Had even one of the employees voluntarily done so, then in accordance with the Board's established practice in such matters, we would be prepared to direct the taking of a representation vote. Neither employee, however, filed such a statement. In these circumstances, and even accepting the evidence of the two employees that Mr. Bertrand did not tell them the use to which the proof of membership documents would be put, we are not prepared on this basis to exercise our discretion to direct the taking of a vote.

12. This brings us to the final basis for the respondent's request that the Board direct the taking of a representation vote. As noted above, part of the respondent's argument in favour of a representation vote was that Mr. Bertrand did not advise the employees that the documents he asked them to sign were to be used to support an application for certification. Notwithstanding this argument, the respondent contends that if Mr. Bertrand did, in fact, advise the

employees of the union's intent to file an application for certification, he went further and misrepresented to them the effect of certification. The existing Cornwall area collective agreement between the respondent and the applicant makes no provision for employee welfare or pension plans. In the Ottawa area, however, the applicant is party to a collective agreement binding on a number of employers which requires the employers to make contributions to both an employee welfare fund and an employee pension fund. The Ottawa area agreement also provides for higher wage rates than are paid in the Cornwall area. According to Mr. Bertrand, when he approached Mr. McDonell about signing a proof of membership document, Mr. McDonell asked if he would become entitled to the Ottawa area benefits. Mr. Bertrand testified that he advised Mr. McDonell that after the union got a collective agreement, he would be entitled to receive the Ottawa area benefits and a pension. It was Mr. Bertrand's further evidence that Mr. Spence asked him about the Ottawa wage rate, to which he replied that when a collective agreement was signed employees would receive the Ottawa rate. Mr. Bertrand's evidence was supported in part by Mr. Len Budge, another representative of the applicant. According to Mr. Budge, he overheard Mr. McDonell and Mr. Bertrand discussing benefits as well as travel time and that he heard Mr. Bertrand explain that these would "take place" after the union was certified. Mr. Budge also testified that after Mr. Bertrand had finished talking, he advised Mr. McDonell that once the union was certified, the union would then have to negotiate travel time and employee benefits. From Mr. Budge's testimony, it appears that any comments he may have made to Mr. McDonell were made after Mr. McDonell had already signed a proof of membership document.

13. Mr. McDonell and Mr. Spence testified that in his discussions with them, Mr. Bertrand did not refer to the Ottawa area benefits or wage rates or what would happen if the applicant were certified. However, if Mr. Bertrand's evidence is accepted, the question arises as to whether he misled the employees as to the effects of certification. Legally, certification of the applicant would only entitle it to negotiate with the respondent with a view to making a collective agreement covering the Ottawa area. (For the purposes of this discussion, we leave aside the industrial, commercial and institutional sector of the construction industry which is governed by a special set of statutory provisions.) The evidence of Mr. Bertrand indicates that if certified the applicant will seek to enter into an agreement with the respondent containing identical terms as the agreement binding on other Ottawa area contractors. We believe we can take note of the fact that in the construction industry trade unions are generally reluctant to enter into a collective agreement with a single employer that provides for terms of employment less favourable for employees (and more favourable to the employer) than those which apply to similar firms in the local area. For a union to enter into such an agreement with one employer would tend to undermine established local conditions as other unionized contractors pressed for concessions which would allow them to compete on an equal basis with the favoured employer. Accordingly, it is quite possible (although not a certainty) that if certified the applicant will, in fact, negotiate a collective agreement with the respondent that contains the same terms as the existing Ottawa area agreement.

14. When dealing with comments made to employees by union representatives seeking to get the employees to sign union membership evidence, the Board draws a line between "salesmanship" which it does not seek to regulate and conduct such as coercion, intimidation and fundamental misrepresentation which may prompt the Board to conclude that the union's membership evidence should not be given any weight. See: *Chemtrusion Inc.* [1979] OLRB Rep. Dec. 1150. In the instant case, if we accept the evidence of Mr. Bertrand, he indicated to the employees that if the applicant were certified it would enter into a collective agreement with the respondent containing the terms of employment found in its agreement with other

Ottawa area employers. While there is no guarantee that this would occur, there is at least a reasonable possibility that it might. Further, Mr. Bertrand did not tell the employees that certification of the union would by itself result in improved benefits. At most he indicated that this would occur upon the signing of a collective agreement. Although neither party put the question to the employees, given the fact that both Mr. Spence and Mr. McDonell have worked in the construction industry for many years as union members, we feel it reasonable to assume that both of them are aware that collective agreements must be negotiated with an employer, and that inherent in the negotiation process is the possibility that a union may not get the terms it desires. Above and beyond this, it must be kept in mind that neither Mr. McDonell or Mr. Spence could recall Mr. Bertrand stating that they would receive the Ottawa area benefits. Accordingly, if Mr. Bertrand did make the statements complained of, they apparently made no impression on the employees. Given these considerations, and keeping in mind that the two employees did not oppose the application for certification, we are not prepared to exercise our discretion to direct the taking of a representation vote.

15. The Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 15, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. We are not prepared to exercise our discretion to direct the taking of a representation vote. The applicant is, accordingly, in a certifiable position.

16. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

17. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1888-84-R International Beverage Dispensers and Bartenders Union, Local 280, Applicant, v. The Last Resort Hotel, Inc carrying on business as **Doyles Tavern**, Respondent

Sale of a Business — Tavern providing nude entertainment closing down — Mortgagee taking possession and selling land, building and chattels — Purchaser taking transfer of liquor licence — commencing tavern business seven months after closure by first owner with emphasis on country and western bands — Renovating and upgrading premises — Not substantial change to preclude declaration of sale

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and C. A. Balentine.

***APPEARANCES:** Elizabeth McIntyre, James Jackson and Joe Leithwood for the applicant; John Doyle and Anthony Indovina for the respondent.*

DECISION OF THE BOARD; December 21, 1984

1. This is an application under section 63 of the *Labour Relations Act*, alleging that a “sale of a business” has taken place with respect to the tavern located at 2763 Danforth Avenue in Toronto, and formerly known as the “Danforth Hotel”. Section 63(1) and (3) provide:

63.-(1) In this section,

(a) “business” includes a part or parts thereof;

(b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

• • •

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

2. The Hotel in question was an establishment licensed for the sale of food and alcoholic beverages. The applicant was certified as bargaining agent for the employees of the Hotel in 1973, and its most recent collective agreement with the Hotel expired some time prior to the Hotel being closed in December of 1983. Over the years, the Hotel under prior owners attempted to induce patronage through one form of entertainment or another, varying from standard rock music to country and western, and most recently through the use of what is broadly termed

“adult entertainment”. This essentially involved the exhibition of male and female nude dancers at the Tavern, and it was the previous owners’ failure to comply with the “adult entertainment” by-law in that regard which in the main led to the Tavern’s closing.

3. The previous owner was Mr. Nick Bruno, or more precisely N. B. Theatrical Agencies Inc., and when his continuing encounters with the law-enforcement authorities led ultimately to the closing of the Hotel, the mortgagee, Mr. Jack Bloom, was forced to enter into possession of the premises to protect his security. Mr. Bloom did not attempt to re-open and operate the Hotel on his own, but rather sought a buyer who might be interested in doing so. Word of the Hotel’s availability came to Mr. John Doyle, and he made an offer, (through his company, The Last Resort Hotel Inc.) to purchase the assets under Mr. Bloom’s control, which Mr. Bloom accepted. The purchase included the land, chattels, and building of the prior owner, conditional upon approval of the transfer of the owner’s liquor licences within a reasonable time. The chattels included tables and chairs, a glass-washing machine, beer fridges, and a stove and other kitchen sundries. By this time the Hotel had been closed for almost six months, and Mr. Doyle entered into an interim agreement to pay rent and operate the Hotel for his own benefit immediately, pending the closing of the ultimate sale. Mr. Doyle also made application to the government for a “convert-to-rental” grant, hoping to ultimately extend the income-producing capacity of the building by renting the rooms above the tavern. Unlike the transfer of the licences, the approval of the “convert-to-rent” grant was not made a condition of the sale.

4. Mr. Doyle accordingly went into possession in June, changing the name of the Hotel to the “Video Rock Tavern”, and, as the name suggests, changing the form of entertainment to video rock as well. Mr. Doyle carried out repairs and renovations to the premises as he went, and after the purchase-deal closed in August, again changed the Hotel’s name to “Doyle’s Hotel”. Mr. Joseph Leithwood, assistant business agent for Local 780, testified that he has been inside the Hotel on many occasions since 1973, and once since Mr. Doyle took it over, and acknowledged that the Hotel has been cleaned up and was “a lot less seedy” than before. The entertainment was once again country and western, with bands from the Maritime provinces being featured for the purpose of attracting to the Hotel former Maritimers now living in the vicinity of the Hotel (together with other local residents). The Hotel operates with two full-time and two part-time staff, being waitresses and a bartender.

5. The respondent argues on these facts that no “sale of a business” can be said to have taken place. The respondent emphasizes the fact that the Danforth Tavern had been closed down for some seven months before the respondent entered the premises, and argues that by that time there was no “business” at the Hotel left to purchase. The respondent, in addition, points to the upgrading it has done to the premises, and the change in the form of entertainment currently being used to attract customers. Finally, the respondent emphasizes its interest in the premises as an investment, assuming the availability of the “convert-to-rental” grant.

6. Dealing with the last point first, the Board notes that, whatever other interest the respondent may have in the premises, it is still making use of the premises to operate the business of a tavern, and expects to generate the greater part of its revenue from that source. It is, of course, only the “tavern” aspect of the premises to which the applicant’s bargaining rights have application in any event. And with respect to those rights, the Board has, with perhaps one exception only, always attached great weight to the fact particular premises once operated as a “tavern business” continue to be operated as a “tavern business”, with or without a hiatus in the operation of the building as such, and with or without a change in the nature of the decor,

entertainment or clientele, so long, at least, as the licence to operate the business itself has in some manner been transferred from the vendor to the purchaser.

7. The one exception to the Board's cases in this industry was in the first of the *Man of Aran* cases, reported at [1973] OLRB Rep. June 313. There the purchasers of the old "Mintz Tavern" converted it from a standard local tavern to an "Irish pub", and the Board came to the conclusion, on application by the employer, that a change in the "character" of the business had taken place, within the meaning of section 63(5) of the Act. In succeeding cases, however, the Board explicitly rejected the approach taken in the *Man of Aran*, case, and stated, for example, in the *Winco-Steak'n Burger* case, [1974] OLRB Rep. Nov. 788, at paragraph 24:

"The implementation of subsection 5 of section 55 (now 63) involves the revocation of the remedial effects otherwise flowing from the provisions of section 55 of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words 'substantially different' must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting *the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable* in all the circumstances of the particular case under review."

(emphasis added)

8. In *Colonial Tavern*, [1978] OLRB Rep. Sept. 806, the basement lounge of the licensed premises was refurbished and converted from a simple "bargain basement" form of beer service to an atmosphere catering to "the double-martini types" (at triple the prices), and the main floor to a "New York bar and grill", in the hopes of attracting the "upper echelon" Yonge Street luncheon traffic. The Board found nonetheless that a "sale of a business" had taken place, and that there had been no "substantial" change in the character of the operation.

9. In *Katrina's Tavern*, [1978] OLRB Rep. Sept. 838, the alleged successor purchased the liquor licence and other assets at a Toronto establishment, and immediately closed it down for a number of months to effect major renovations. In that period of time the premises were converted from a rough-and-tumble establishment catering to "young kids" and motorcycle gangs to a fashionable and sophisticated "gay" bar. Notwithstanding the Board's finding that the purchaser had indeed succeeded in making a "silk purse out of a sow's ear", the Board went to conclude:

"The Board is interested in whether there has been a continuation of the business. Here there was a transfer of the liquor licence, a leasehold interest, various tangible assets, and interests in contracts virtually all of which could and would be used to carry on the business of the sale of food and drink. Therefore, it would seem that there was a continuation of the business in which The Forge was engaged and, unless section 55(5) operates, a sale of a business within the meaning of section 55. The fact that the business was closed for approximately eight months does not affect the conclusion in this case. The Employer here closed to effect repairs and renovations and was prepared to open whenever these were completed. There was still a transfer

of assets and most importantly, after this transfer the same sort of business continued to operate from the premises.”

The Board then went on to note the rejection of the approach adopted in the earlier *Man of Aran* case, and found no substantial change in the character of the operation, within the meaning of subsection 5 of the what is now section 63.

10. In *Cabbagetown Inn*, board File No. 2780-80-R, released May 1, 1981, the mortgagees on the property were, as in our own case, forced to go into possession to protect their security and the existing liquor licence. Under the mortgagees, the premises remained closed for some four to five months, eventually re-opening under new owners and a different name. The Board found a “sale”, and in particular noted at paragraph 14:

“We are of the opinion that the transaction between Rapaaport and Rubenstein, the second mortgagees in possession, and the respondent constituted a “sale” by Muckles. The Board has previously found that the interposition of a third party, acting as an agent or conduit is irrelevant so long as a transfer takes place. (See *Marvel Jewelry Ltd.*, [1975] OLRB Rep. Sept. 733.) In the instant case, the mortgagees in possession took steps to ensure that there was no lapse of the liquor license on their entering into possession.”

Similarly, in *Vivace Tavern Inc.*, [1982] OLRB Rep. Aug. 1224, the sale of the premises and its licences under power of sale by the solicitors in trust for the mortgagees did not preclude a finding of a “sale”. And most recently in *Blondie’s Tavern*, Board File No. 2073-83-R, the former owner defaulted on his mortgage, the tavern closed down, and the mortgagee went into possession. The premises remained closed for some five to six months while the mortgagee sought and completed a suitable sale transaction, after which the tavern re-opened under the new owners and, as usual, a new name. In this case the transfer of the licence by the L.L.B.O. was not made an actual *condition* of the sale transaction, but was, with the vendors co-operation, accomplished in any event. The Board, on these facts, once again found that a “sale of a business” had occurred.

11. The cases cited above leave little room for argument in the present case. With respect to the entertainment and decor of a particular establishment, experience with the industry has shown that “themes” may come and “themes” may go (as in fact has already occurred once within the short period that the present facility has been operated by the respondent), but so long as a transaction has taken place involving the assets (and in particular the licence) essential to carrying on the business of a tavern, the Board will find a “sale”. The fact that the present premises have been upgraded is not disputed by the applicant, but neither that, nor the introduction of varying forms of entertainment to attract patronage, can be said to produce a substantial change in the essential character of the business, to the point of rendering the continued representation of the tavern’s employees by the applicant in any way inappropriate.

12. The Board accordingly declares that a “sale of a business” has taken place to the respondent, within the meaning of section 63(1) of the Act, and that the applicant’s bargaining rights continue. The applicant is accordingly entitled to give notice to bargain to the respondent, pursuant to the provisions of section 63(3).

1526-84-U Ontario Nurses' Association, Complainant, v. Edward Street Manor Nursing Home, Respondent

Arbitration — Practice and Procedure — Settlement — Unfair Labour Practice — Whether settlement of freeze violation complaint with no fixed time restriction enforceable after statutory freeze ended — Whether Board differing to arbitration

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members
W. H. Wightman and J. Kennedy.

APPEARANCES: *Shalom Schachter, Maureen O'Halloran, Norma Bush and Sherrie Seeley for the complainant; K. W. Kort, P. Bogue, S. McKinnon and W. McKinnon for the respondent.*

DECISION OF S. A. TACON, VICE-CHAIRMAN, AND BOARD MEMBER J. KENNEDY;
December 17, 1984

1. This is a complaint under section 89 of the *Labour Relations Act* alleging violation of sections 64, 66 and 89(7) in the lay-off of Norma Bush and the abolition of the head nurse position by the respondent.

2. The parties agreed to the following facts:

- (a) On or about May 13, 1981, the complainant applied for certification of a bargaining unit consisting of registered nurses employed by the respondent.
- (b) On or about May 29, 1981, the complainant filed with the Ontario Labour Relations Board a section 89 complaint (File #0458-81-U) alleging a number of violations by the respondent of the *Labour Relations Act* and including in particular paragraph 10 an allegation concerning the reorganization of nursing work and the removal of a Norma Bush from the position of head nurse.
- (c) On or about June 19, 1981 the Ontario Labour Relations Board granted the complainant two certificates covering full-time and part-time nurses in the bargaining units.
- (d) On or about June 22, 1981, the parties entered into a settlement in respect of the unfair labour practice referred to in paragraph (b) above. The settlement included a paragraph 1 which was an acknowledgement by the employer that it had violated the Ontario *Labour Relations Act* and a paragraph 3 in which the employer agreed *inter alia* not to alter the wages, terms or conditions of employment, rights, privileges or duties of Norma Bush without the consent of the complainant and they further agreed to reinstate Norma Bush in her former status as Head Nurse.
- (e) On or about June 23, 1981 the complainant served notice to bargain under section 14 of the *Labour Relations Act* of the respondent.

- (f) On or about October 27, 1981, the complainant filed a second section 89 complaint against the respondent (Board File 1622-81-U). In its decision of February 24, 1982, in paragraph 7, the Board ruled that "the absence of evidence to the contrary, we are prepared to infer that the acknowledgement by the employer that it violated the Act, as set forth in paragraph 1 of the Minutes of Settlement dated June 22, 1981, is a blanket acknowledgement of all of the allegations contained in Appendix B to the previous complaint." The respondent had the opportunity to adduce evidence to rebut that inference but no such evidence was adduced.
- (g) On or about January 15, 1982, the complainant was advised by the Deputy Minister of Labour that the conciliation officer appointed in the dispute had been unable to effect a collective agreement.
- (h) On or about January 22, 1982, the complainant referred the matter to arbitration under the provisions of the *Hospital Labour Disputes Arbitration Act*.
- (i) On or about June 21, 1982, the Board of Arbitration held a hearing in the matter.
- (j) On or about April 3, 1984, the Board of Arbitration issued a supplement to the award ordering up the collective agreement under sub-section 10(6) of the *Hospital Labour Disputes Arbitration Act*. At no time during the negotiations or the arbitration proceedings did the respondent seek to include in the collective agreement a provision which would contain the consent of the complainant to remove Norma Bush from her status as head nurse.
- (k) A collective agreement was executed by the parties, effective from June 23, 1981 to June 22, 1983 and, by operation of law, extended to June 22, 1984.
- (l) The parties have utilized the grievance procedure under the collective agreement on several occasions, including Norma Bush's grievance filed August 2, 1984 regarding premium pay. This grievance was settled without an arbitration hearing.
- (m) Notice to bargain for the renewal of the collective agreement, due to expire on June 23, 1984, was given on May 22, 1984.

3. The minutes of settlement in respect of the unfair labour practice complaint noted in item (d) above is reproduced here:

IN THE MATTER OF A COMPLAINT
UNDER SECTION 79
OF THE LABOUR RELATIONS ACT

BETWEEN

ONTARIO NURSES' ASSOCIATION,

(the Complainant),

-AND-

EDWARD STREET MANOR NURSING HOME

(the Respondent).

MINUTES OF SETTLEMENT

The parties agree to settle the above matter on the following basis:

1. The Employer acknowledges that it has violated the Ontario Labour Relations Act.
2. The Employer agrees that it will bargain exclusively with the Ontario Nurses' Association in the latter's capacity as the sole collective bargaining agent for the registered nurses.
3. The Employer agrees that it shall not alter the wages, terms or conditions of employment, rights, privileges or duties of any of its nurses and without restricting the generality of the foregoing, those of Ms. Norma Bush, without the consent of the Ontario Nurses' Association. The Employer further agrees that Ms. Norma Bush will be reinstated to her former status as Head Nurse.
4. The Association agrees to request leave of the Ontario Labour Relations Board to withdraw its Complaint under Section 79 dated May 29, 1981 and appearing on Board File #0458-81-U.

DATED AT TORONTO this 22 day of June 1981.

For the Ontario Nurses'
Association:

For the Employer:

(Ontario Labour Relations
Board File #0458-81-U).

4. The respondent raised two preliminary objections. Firstly, it was submitted that the minutes of settlement ceased to operate once the collective agreement was in force and, therefore, a complaint could not be based on the defunct minutes of settlement. Secondly, even if there was a complaint, a grievance under the collective agreement was the appropriate forum for relief and, thus, the Board should defer to arbitration. The complainant opposed both these submissions. Both parties indicated they wished to make more detailed submissions but requested an initial ruling from the Board on the complaint as framed.

5. The Board made the following oral ruling:

“The Board has considered the submissions of the parties thus far. The Board is of the opinion that the complainant is alleging:

- (a) a violation of section 89(7) of the Act, i.e., that the minutes of settlement have been violated;
- (b) a violation of sections 64 and 66 of the Act, i.e., an “89(1) type” complaint triggering the reverse onus provision in section 89(5) of the Act.

In the Board’s view, these allegations are discrete and should be dealt with separately or at least *in seriatim*.

Therefore, the Board wishes to hear the full submissions of the parties re: the alleged violation of section 89(7), i.e., the parties should fully address the respondent’s preliminary objection that the minutes of settlement cease to operate when the collective agreement is signed and the complainant’s response that the minutes of settlement survive the signing of the collective agreement.

This does not involve the hearing of evidence beyond the documents filed with the Board and the agreement of the respondent to the facts set out in Appendix II of the complaint, to the extent already noted.

Further, the Board wishes to hear the full submissions of the parties as to whether the Board should defer to arbitration in the circumstances, as contended by the respondent and opposed by the complainant. These submissions, too, do not involve the hearing of further evidence.”

6. With respect to the minutes of settlement and section 89(7), the respondent submitted that the collective agreement, when signed, represents the sum total of the terms and conditions of employment. Counsel referred to *Syndicat Catholique des Employes de Magasins de Quebec, Inc. v. Compagnie Paquet Ltee.*, [1959] S.C.R. 206, 18 D.L.R. (2d) 346, 59 CLLC ¶15,409. The minutes could not constitute “another” source of terms and conditions and, thus, were “spent” when the collective agreement was imposed through arbitration. Moreover, it was argued that the statutory violation with respect to Norma Bush was in regard to the freeze provision, section 79 of the Act. Paragraph 3 of the minutes incorporated the statutory language of the freeze provision. The freeze provisions of the Act are intended to preserve the *status quo* to afford the parties an opportunity to negotiate a collective agreement. The freeze provisions give way to the terms and conditions set out in a collective agreement. So, too, the minutes should cease to operate when that collective agreement was signed. Counsel referred to *Scarborough Centenary Hospital Association*, [1979] OLRB Rep. July 693. In reply, counsel for the respondent submitted that the language of the minutes embraced all employees in the bargaining unit and, if the minutes continued to operate, why negotiate layoff provisions, management rights clauses, etc. Further, it was contended that there was nothing improper in negotiating one’s way out of the terms of the settlement of a Board complaint. The cases cited by the applicant (see below) were distinguished.

7. The respondent also submitted that the Board should defer to arbitration. The collective agreement contained several clauses relevant to management rights concerning reorganization and the propriety of management's actions regarding Norma Bush should be determined in the context of the collective agreement provisions. The parties had utilized the grievance and arbitration process in the past. There were no policy reasons for the Board not to defer to arbitration. That the applicant would not have the benefit of the "reverse onus" at arbitration was not a reason to refuse to defer the issue to an arbitrator. In fact, it was argued that not to defer would permit the applicant to "forum-shop". The applicant and Norma Bush were the authors of their own misfortune when Norma Bush elected layoff rather than bumping into another position and then when they exceeded the time limits for filing a grievance. *Ramada 400/401*, [1983] OLRB Rep. July 1192 and *The Canadian Union of Operating Engineers and General Workers*, [1983] OLRB Rep. Oct. 1633 were referred to in support.

8. The complainant submitted the minutes of settlement survive the collective agreement for several reasons. The undertakings of the employer had no fixed termination date and, even though a formal Board order would have had application for a limited time, the minutes were for all time. There was nothing improper in one party achieving more through a settlement than could have been obtained through adjudication. The applicant confirmed that its position was that all employees in the bargaining unit (not just Norma Bush) were affected by and covered by the terms of the minutes. The complainant was objecting to both the layoff of Norma Bush and the abolition of the head nurse position as constituting violations of the minutes, i.e., a contravention of section 89(7). Further, on policy grounds, the Board should not permit a party to negotiate its way out of a settlement since negotiations permitted the use of bargaining power. That is, section 89(7) of the Act was a statutory right to have settlements enforced; one cannot contract out of a statutory right. The Board should exercise extreme caution in permitting one side to use its bargaining power to force a contracting out of statutory rights. The minutes of settlement could co-exist with the collective agreement as a source of rights. Finally, the "freeze" provisions in the Act protect rights and privileges as well as the terms and conditions of employment. Specifically, the second freeze (which the complainant asserts was violated) protected the terms and conditions of the collective agreement (which had yet to be finally signed but which had already expired) and the rights and privileges of the first freeze (as expressed in the minutes of settlement). Cases referred to in support include: *Scarborough Centenary Hospital Association, supra*; *Perfection Rug Co. Ltd.*, [1984] OLRB Rep. Jan. 68; *Brentwood Manor Nursing Home Limited*, [1984] OLRB Rep. Mar. 415; *John T. Hepburn, Limited*, [1984] OLRB Rep. Jan 39; *Irwin Toy Limited*, [1983] OLRB Rep. July 1064; *Greens Ambulance*, [1978] OLRB July Rep. 637; *The Children's Aid Society of Ottawa-Carleton*, [1984] OLRB Rep. Feb. 340.

9. In the alternative, the complainant urged the Board not to defer to arbitration. It was submitted that the factors in deciding whether to defer, as discussed in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, were largely applicable in the instant case. That is, an arbitrator would not consider the Board doctrine of anti-union animus in interpreting the collective agreement. The benefit of the reverse onus provision in the Act would be lost at arbitration. There was a real question as to the weight an arbitrator would give to the earlier Board findings in *Edward Street Manor Nursing Home* [1982] OLRB Rep. Feb. 167. Moreover, an arbitrator could not respond to a violation of the *Labour Relations Act*. Thus, the Board should not deny the applicant, having alleged violation of sections 64 and 66 the right to be heard under the Act. Also referred to were: *Irwin Toy Limited, supra*; *The Children's Aid Society of Ottawa-Carleton, supra*; *Kennedy Lodge Inc.*, [1984] OLRB Rep. July 931). Finally, if the Board did defer to arbitration, it was submitted that the Board should retain jurisdiction and,

secondly, in view of the close timing of the union's response to the employer's actions, should direct the arbitrator to hear the merits notwithstanding the time limits in the collective agreement.

10. The Board must first deal with the complainant's argument that the minutes of settlement constitute a settlement within the meaning of section 89(7) of the Act and the respondent's contention that the minutes cease to operate when the parties enter into a collective agreement.

11. The cases cited to the Board are not especially helpful in resolving this issue. Several of the cases set out or reaffirm broad principles which this Board does not dispute. For example, that it is Board policy to encourage settlement activity as a highly desirable method of resolving labour relations disputes and not to impose unnecessary technicalities or limitations which might discourage such settlements is not in question (see *Perfection Rug Co. Ltd.*, *supra*). In *The Children's Aid Society of Ottawa Carleton*, *supra*, the Board may be said to have reaffirmed the general principle that one cannot contract out of or waive statutory rights although, in the circumstances of that case, the Board did not dispose of the matter on such a sweeping basis. The passage in *Brantwood Manor Nursing Homes Limited*, *supra*, stressed by the complainant (i.e., paragraph 13) rejects the proposition that the Board will readily permit a party to repudiate a settlement in its entirety because some provisions of that settlement may be ambiguous in their application to particular cases or because one party merely claimed the settlement did not meet unexpressed expectations or supposedly implicit understandings which do not appear on the face of the document. However, even that passage is qualified by comments as to the possible unenforceability of the settlement (or at least portions thereof) pursuant to section 89(7) of the Act and by the refusal of the Board to absolutely preclude the possibility that a particular settlement in some circumstances may be void. With respect to *Irwin Toy*, *supra*, this Board regards that case as so removed from the facts of the instant case that the passages referred to by the complainant (paragraphs 18 and 19) are not of assistance. Finally, the Board does not consider *Greens Ambulance*, *supra*, *John T. Hepburn, Limited*, *supra*, and *Scarborough Centenary Hospital Association*, *supra*, as directed to the matters in issue here. Argument was directed by both counsel to the *Scarborough Centenary Hospital* case and the freeze provisions of the Act in relation to whether there was a statutory freeze in effect at the time of the reorganization and, if so, what precisely was "frozen". However, the allegations before the Board in this complaint do not allege violation of section 79 of the Act. The Board, then, does not intend to deal with this aspect further.

12. It is appropriate to set out section 89(7) of the *Labour Relations Act* at this point:

(7) Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

13. In this Board's view, the settlement entered into on June 22, 1981, cannot be read in the sweeping manner asserted by the complainant. It was not disputed that, in relation to Norma Bush, the respondent's admitted violation of the *Labour Relations Act* flowed solely from a contravention of the statutory "freeze" provisions in section 79. The language in paragraph 3 of the minutes of settlement reflects this. The freeze provisions of the Act do not create rights which exist throughout the relationship of the parties, as do the rights and protections in other sections of the Act, such as 64, 66 and 70. Rather, the statutory freeze comes into effect and comes to an end at specified points in the collective bargaining process. The freeze is intended to preserve the *status quo*, to maintain "business as usual", so as to provide a period of industrial relations stability and, thereby, facilitate the bargaining process. (See, *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. June 479; *Windsor Airline Limousine Services Ltd.*, [1980] OLRB Rep. July 1147; *K-Mart Canada Ltd.*, [1982] OLRB Rep. Jan. 64.)

14. Section 79(1) and (2) reads:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 14, in which case subsection (1) applies; or

- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

15. What the complainant seeks to do is to transform a "right" which is intended to be of finite duration into a right for all time. The complainant conceded that, had the settlement not been effected, a Board order to remedy the violation of the freeze provision would have been limited in time. The complainant asserts, however, that the fact that the respondent settled the complaint on less favourable terms than would have been imposed by the Board should not relieve the respondent of the obligations of his "bad bargain". The Board, however, considers that the minutes of settlement, as applicable to Norma Bush, must be read as of finite duration. The Board is neither seeking to regulate the terms of settlements voluntarily agreed to by the parties nor is the Board agreeing with the respondent's broad proposition that all settlements cease to operate when a collective agreement is entered into. Rather, in each case where the enforcement of a settlement is sought pursuant to section 89(7), the Board must examine the terms of the settlement but that necessarily includes consideration of the alleged violation of the Act which ultimately led to the settlement. To ignore the alleged statutory violation in the examination of the settlement provisions is just not sensible.

16. In the Board's view, to preserve a settlement in a time period beyond that in which the Board would normally extend a remedy (where the allegations were substantiated) would require clear and express language especially where, as here, the original complaint concerned a violation of a "strict liability section", i.e., where anti-union animus or motive is not an element of the violation. Moreover, the complainant is simply incorrect in its assertion that a decision not to enforce the minutes of settlement in this case (at least as applicable to Norma Bush and the head nurse position) would permit the contracting out of statutory rights.

17. Therefore, the complainant's assertion that the minutes of settlement of June 22, 1981, in respect of Norma Bush, are enforceable pursuant to section 89(7) of the Act at this point in time is rejected.

18. The Board must next deal with the respondent's preliminary objection that the Board defer consideration of the "section 89(1) type" complaint (to use the Board's terminology at the hearing) to arbitration. The classic exposition of the relevant factors in the Board's assessment whether to defer to arbitration is found in *Valdi Inc.*, *supra*, at paragraphs 4 to 8, inclusive. It is useful to set out paragraph 7 in full, at this point:

7. It may be that the Board's approach has been somewhat less refined but the American treatment of deferral is not inconsistent with Board jurisprudence. Cases like *Canadian Acme Screw and Gear Limited* (1954), 54 CLLC ¶17,083; *John Inglis Co. Ltd.* (1953), 53 CLLC ¶17,049; *National Showcase Co. Ltd.* (1961), 61 CLLC ¶16,185; *Heist Industrial Services Ltd.* (1963), 63 CLLC ¶16,263; *Wallace Barnes Co. Ltd.* (1961), 61 CLLC ¶16,198 and *Collingwood Shipyards*, [1967] OLRB Rep. July 376 all approach the deferral doctrine as one that will encourage the practice and procedure of collective bargaining. These cases are also aimed at discouraging dual litigation and forum shopping by encouraging the parties to employ initially the contractual procedures for dispute settlement which they have created. See *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49. But it is also apparent that in those cases the Board acted on the premise that the resolution of the contractual issues was congruent with the resolution of the

statutory unfair labour practice issues. See *Imperial Tobacco Products (Ont.) Ltd. et al.*, [1974] OLRB Rep. July 418 at para. 26. This congruence between the contractual dispute and the overlying unfair labour practice complaint is significant in the sense that the Board is able to take the view that the matter is primarily a contractual or factual difference between the parties. See *Corporation of the County of Middlesex*, [1976] OLRB Rep. Aug. 427 at para. 4. However, where key provisions of *The Labour Relations Act* require important elaboration and application or where the employer's or trade union's conduct represents a total repudiation of the collective bargaining process, it becomes more difficult to characterize the complaint as essentially contractual. It is in these situations that the Board has asserted its jurisdiction. The former situation is reflected in *Thomas Built Buses Ltd.*, [1980] OLRB Rep. Feb. 264 and the latter can be seen in *New Gregory House*, [1977] OLRB Rep. Sept. 584. Other circumstances in which the Board has been unwilling to defer to grievance arbitration involve cases where arbitration may have been unavailable to the complainant or where relief in that forum could have been inadequate. See *Wallace Barnes Company Ltd.* (1961), 61 CLLC ¶16,198 and the general discussion in *Imperial Tobacco Products (Ontario) Limited, supra*. Moreover, where the Board defers to the arbitration process it will nevertheless retain jurisdiction as the NLRB in order to insure (a) that the dispute over the meaning of the collective agreement is resolved with reasonable promptness; (b) that the arbitration procedures have been fair; and (c) that the outcome of arbitration is neither repugnant to the purposes of the Act nor remedially inadequate. See *Imperial Tobacco Products (Ontario) Limited, supra*, for a full discussion of these subsidiary principles. We are also of the view similar to positions taken in *Banyard and Stephenson, supra*, that the Board will not defer or will exercise its retained jurisdiction where the grievance or board of arbitration fails to deal directly and explicitly with the unfair labour practice issues.

19. In *Valdi Inc., supra*, the Board considered that the fact the complaint centred on the grievor's union activity and involved a dismissal would not usually be sufficient justification for the Board to intervene in a collective bargaining relationship. However, the features which led the Board to exercise its jurisdiction were the probationary status of the grievor and the fact that the dispute arose under a first collective agreement. Specifically, the Board was influenced by the following:

- (a) the context of the first collective agreement raised a question as to the adequacy of the arbitral remedy of reinstatement;
- (b) the right of access of probationary employees to grievance arbitration was not certain, thus calling into question the efficiency of the arbitral route;
- (c) the question of which party would bear the onus was in doubt at arbitration but clear before the Board;
- (d) there was a question as to whether an arbitrator would apply the Board's "taint" theory in reviewing the dismissal.

20. The Board considers that many of the concerns which were influential in *Valdi Inc., supra*, are present in the instant case. Here, the parties are also at a relatively early stage in their collective bargaining relationship. In fact, the first collective agreement was imposed on the parties by an arbitrator because the parties could not negotiate a settlement themselves. Secondly, while the issue is not a probationary employee's access to grievance arbitration but management rights, the same question as to the efficacy of the arbitration route is raised. There is the extensive arbitral jurisprudence regarding the interpretation of management rights clauses, as, indeed, the respondent pointed out (see generally, Brown and Beatty, *Canadian Labour Arbitration* (2nd edition) at 1:2000, 4:2300 and 5:000). An approach to the grievance as a matter of the interpretation of management rights provisions in the collective agreement would deprive the grievor of the benefit of the reverse onus provision under the *Labour Relations Act* and even of the reverse onus at arbitration applicable in cases where unjust discipline is alleged. As in *Valdi Inc., supra*, there is a question as to whether an arbitrator would apply — or even consider — the Board's "taint" theory in reviewing, not a dismissal as such, but a reorganization of the workplace.

21. The Board would adopt the phrasing in *Valdi Inc., supra*, (para. 12):

"... Against this background of conflicting authority and philosophy, it can hardly be said that the grievor has free access to grievance arbitration and that the policies underlying the *Labour Relations Act* would be best effected by deferral to that process ...".

The Board does not disagree with the reasoning in the cases cited by the respondent. The Board regards those cases as ones in which the principles enunciated in *Valdi Inc., supra*, were not applicable and, hence, clearly distinguishable from the instant case.

22. Thus, the Board is not prepared to exercise its discretion under the Act and defer to arbitration. The complaint, as restricted to an "89(1) type" complaint, is referred to the Registrar to be set down for hearing. This panel is not seized in this matter. The 89(7) complaint, for the reasons set out above, is dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN, CONCURRING IN PART AND DISSENTING IN PART;

1. I join with the majority in its finding that the section 89(7) complaint should be rejected.

2. I cannot agree, however, that the Board should entertain the outstanding issues rather than defer to arbitration. One has the feeling that the difficulties the complainant would face as a consequence of having failed to grieve weighed most heavily in the Board's decision not to exercise its discretion and to defer. Each occasion of this sort opens the door a little further to the use of the Board as an arbitration tribunal for progressively tenuous reasons.

1515-84-R Canadian Union of Restaurant and Related Employees, Hotel Employees and Restaurant Employees Union, Local 88, AFL-CIO-CLC, Applicant, v. **Famz Foods Limited**, Respondent, v. Canadian Union of Restaurant and Related Employees, Incumbent Trade Union, v. United Food and Commercial Workers International Union, Intervener

Certification — Practice and Procedure — Representation Vote — Board policy in displacement applications to direct vote between applicant and incumbent unions — Vote not directed where incumbent indicating content to abandon bargaining rights

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members W. G. Donnelly and H. Kobryn.

DECISION OF THE BOARD; December 20, 1984

1. This is an application for certification. The applicant is a trade union as defined by clause 1(1)(p) of the *Labour Relations Act*. The respondent operates a Swiss Chalet restaurant. In its Reply, it alleges it is bound by a collective agreement between the Swiss Chalet Employers' Association ("SCEA") and the Canadian Union of Restaurant and Related Employees ("CURRE"). CURRE did not file an intervention in this application, but counsel for Local 88 advised the Board that he was authorized to speak on CURRE's behalf. It has been a matter of uncontraverted evidence in another proceeding before this Board that Local 88 was brought into existence as the vehicle for a proposed merger of CURRE into the Hotel Employees and Restaurant Employees International Union. By a decision dated September 12, 1984, in Board File No. 2628-83-R, a differently constituted panel of the Board found that an attempt by the executive board of CURRE to cause CURRE to merge into Local 88 was legally ineffective, and the Board declared that Local 88 had not acquired CURRE's rights, privileges and duties under the *Labour Relations Act*. The term of the agreement between the SCEA and CURRE ended November 8, 1984, and the existence of that agreement would not bar a certification application filed on or after September 9, 1984. This and a number of other applications for certification with respect to employees of Swiss Chalet Restaurants were filed by Local 88 shortly after that date. The United Food and Commercial Workers International Union ("the UFCW") sought to intervene in all of those application but, as a result of this panel's decisions of November 23rd and December 10th, the UFCW was denied standing in this and five others of Local 88's certification applications. This and four of those five other applications were heard on their merits on December 10, 1984, at which time the Board in each case reserved its decision, on the issue now dealt with in paragraphs 5, 6 and 7 of this decision.

2. Having regard to the agreement of the parties, the Board finds that

all waitresses, waiters, busboys, kitchen staff, cashiers and bartenders employed by the respondent at 3078 Dougall Avenue, Windsor, Ontario, save and except assistant hostesses and persons above the rank of assistant hostess,

constitute a unit of employees of the respondent appropriate for collective bargaining. We should note that this respondent is not alleged to operate any other Swiss Chalet Restaurant in the City of Windsor, or anywhere else in the Province of Ontario.

3. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 25, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

4. Subsection 7(2) of the Act provides that if an applicant trade union establishes that more than fifty-five per cent of the employees in the appropriate bargaining unit were members of the trade union at the relevant time, then the Board may, in its discretion, either order a representation vote or certify the applicant without a vote. When another trade union already has bargaining rights with respect to the employees in question, the Board's practice has been to order a representation vote among the employees affected by the application; see, for example, *Thomas Fuller Construction Company (1958) Limited*, [1963] OLRB Rep. May 108; *Redfern Construction Company Limited*, [1967] OLRB Rep. Sept. 606; *Nadeco Limited*, [1970] OLRB Rep. April 141. This practice, and the reason for it, were described nearly forty years ago in *Canadian John Wood Manufacturing Co., Ltd.*, 46 CLLC ¶16,449, where Professor Finkelman wrote:

...There has been no intervention in the present proceedings. Had the United Steelworkers of America, Local 3062, intervened in these proceedings, we should have followed our usual practice in such cases, a practice sanctioned by the decision of the National Board in the *New York Central* case, [Dominion ¶10,436], and directed a vote in which the name of the petitioner as well as that of the aforementioned trade union would both have appeared on the ballot, so as to enable the employees to indicate their preference. In our opinion, the employees should be afforded such a choice in this instance despite the fact that the United Steelworkers of America, Local 3062, has not intervened in these proceedings. Such a course would carry out the thought which motivated the National Board in the *New York Central* case, *supra*, namely, that *an organization which holds a collective agreement should not be displaced unless the employees are given an opportunity to mark their ballots in its favour.*

Our conclusion in this respect is also in line with our decisions in the *Beach Foundary* case, [¶16,443], the *Purity Bread* case, [¶16,447] and the *Toronto Transportation Commission* case, [¶16,448]. The underlying principle in all of these cases is that stability in collective bargaining relations should be promoted to the fullest extent that the law will permit. *This case must be distinguished from those cases in which an trade union or employees' organization party to such agreement, having lost interest in the employees, makes no effort to renew the agreement.* It must also be distinguished from those cases in which a trade union or employees' organization party to an agreement has been dissolved or has disintegrated and has thus ceased to exist. *Breihaupt Leather* case, [¶16,446]. In those instances, we would not be inclined to include the name of such an organization on the ballot unless it actually intervened in the proceedings. Here, the trade union which was a party to the agreement was still a living force and still retained its interest in the collective agreement when the application of the present petitioner was filed.

[emphasis added]

An applicant's success in a displacement application has the effect of terminating the bargaining rights of the incumbent trade union. The principles set out in the passage quoted from *John Wood Manufacturing Co., Ltd.*, *supra*, are reflected explicitly in the provisions of the Act which deal with the termination of bargaining rights on the application of employees, and particularly in section 57(3) of the Act.

5. In his capacity as spokesman for CURRE, counsel for Local 88 advised the Board that CURRE did not oppose Local 88's acquisition of the bargaining rights CURRE claimed to have, and CURRE no longer wished to assert bargaining rights with respect to the employees affected by this application. Counsel suggested that CURRE's position obviated the need for a representation vote. Counsel said he recognized the Board's invariable practice of ordering a vote in displacement situations, however, and had been unable to find any authority which might assist us in determining whether or not to follow that practice in circumstances such as these, where the alleged incumbent does not wish to participate in a vote.

6. The Board's endorsement in *The Marra's Bread Limited*, [1965] OLRB Rep. June 156 reads as follows:

In its endorsement dated June 9th, 1965, the Board directed that a representation vote be taken among the employees of the respondent in the bargaining unit in which voters will be given a choice between the applicant and The Association of Driver Salesmen, Warehousemen and Over-The-Road Drivers of Marra's Bread Limited. Since that endorsement was issued, the Board has been advised by letter dated June 11th, 1965, over the signatures of representatives of the Association, that the Association no longer claimed to represent the employees of the respondent and did not wish to participate in a vote.

Having in mind these circumstances and the representations of the parties, the Board revokes its direction that a representation vote be taken in this matter.

Although it is not made explicit by the endorsement, one presumes the applicant trade union was thereafter certified without a vote. In *The Craig Bit Company Limited*, [1978] OLRB Rep. May 411, the incumbent employees' Association had held a meeting to discuss the subject of representation by the Steelworkers, and a large majority of its members had voted in favour. The Steelworkers organized the unit in the appropriate way, and at the hearing of its application for certification, the employees' Association filed a document indicating that it no longer wished to retain its bargaining rights with respect to the unit in question. The Board held that there was "no reasonable requirement for the holding of a representation vote between the applicant and the employees' Association", and certified the applicant without conducting such a vote.

7. Even in the context of a termination application, where the statute makes it necessary to resort to a representation vote before the rights of an incumbent trade union can be terminated, sub-section 57(5) provides:

Upon an application under subsection (1) and (2), where the trade union concerned informs the Board that it does not desire to continue to represent

the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit.

8. We are satisfied that there is no labour relations policy that requires a representation vote between an applicant and an incumbent when the incumbent is content to abandon its bargaining rights. Of course, the existence or otherwise of a trade union holding bargaining rights with respect to affected employees is not the only factor the Board considers in determining whether to order a representation vote notwithstanding the demonstration by an applicant trade union of membership support sufficient to warrant certification without a vote. In this case, however, none of the interested parties has put before us any other circumstance which would lead us to exercise our discretion in favour of directing a vote. There is nothing in the material properly before us in this case which suggests that the membership evidence submitted by the applicant is unreliable as a measure of the employees' desire to have the applicant represent them in collective bargaining with the respondent, or that Local 88 has been the beneficiary, directly or indirectly through the medium of CURRE, of employer support of such a nature as would disentitle it to certification. In all these circumstances, we are satisfied that we do not need the confirmatory evidence of a representation vote, and have determined not to direct that one be conducted.

9. It should be noted that there are other proceedings before the Board involving Local 88, CURRE, the UFCW, and the employers of persons employed at other Swiss Chalet Restaurants, in which CURRE's bargaining rights and its agreement with the SCEA have been challenged by the UFCW. It is not necessary for us to determine whether that challenge, if successful, would compel the conclusion that CURRE did not have the rights of an incumbent trade union with respect to the employees affected by this application. If there were no incumbent trade union, then there would equally have been no circumstance properly before us which would have led to our ordering a representation vote.

10. Accordingly, a certificate will issue to the applicant with respect to the bargaining unit referred to in paragraph 2 of this decision.

2210-84-R;2211-84-U United Food and Commercial Workers International Union, Local 175, Applicant/Complainant, v. Roadside Developments Limited, carrying on business as the **Flying Dutchman Hotel**, Respondent, v. Group of Employees, Objectors

Bargaining Unit — Practice and Procedure — Board not persuaded that practice exists of excluding front desk staff from service unit in hotel industry — But finding exclusion appropriate in particular circumstances

BEFORE: Harry Freedman, Vice-Chairman, and Board Members B. L. Armstrong and F. W. Murray.

***APPEARANCES:** Douglas J. Wray, Bruce Zufelt; John Hurley and Mark James for the applicant/complainant; Thomas A. Stefanik, James Bourke, Dan Reid, Anne Goemans, Clive Rivett and Marg Rand for the respondent; Mary Tearse, Louise Tielemans and Ian Parkes for the objectors.*

DECISION OF THE BOARD; December 18, 1984

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2. The Board directs that the above application and complaint be and the same are hereby consolidated.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The Board received evidence and submissions from the parties relating to the description of the appropriate bargaining units at its hearings on November 30th and December 4th, 1984. The majority of the Board (Board member F.W. Murray dissenting) delivered the following oral ruling at its hearing on December 4, 1984.

ORAL RULING

The applicant union has applied for certification to represent certain employees of the respondent. The parties have agreed that there are two units of employees appropriate for collective bargaining, a full-time unit and a part-time unit, and are agreed to the description of those units, save for the exclusion of the front desk staff.

The bargaining unit descriptions agreed to are:

all employees of the respondent in the Town of Newcastle save and except department heads, persons above the rank of department head, control clerk, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period; and

all employees of the respondent in the Town of Newcastle regularly employed for not more than 24 hours per week and students employed during

the school vacation period save and except department heads, persons above the rank of department head and control clerk.

The applicant argues that the front desk staff do not share a community of interest with the other employees for whom the applicant seeks bargaining rights, and further, that the Board's normal practice in the hotel industry is to exclude front desk staff from a service unit. The representative of the objecting employees and counsel for the respondent argue that the front desk employees do share a community of interest with the other employees. Counsel for the respondent further submits that there is no definite rule or practice with respect to excluding front desk staff from a service unit in the hotel industry and also submits that on the facts before the Board in this case, the exclusion of the front desk staff would be contrary to the preamble of the *Labour Relations Act* since it would effectively deprive those employees of their right to engage in collective bargaining and would lead to undue fragmentation of the employer's organization.

The Board received detailed evidence from several witnesses relating to the duties of the front desk staff and their community of interest, or lack thereof, which was generally consistent on the salient facts. Aside from acting as receptionist for the respondent, and checking guests in and out, the front desk staff, (aside from the night front desk person, Stella Morrison, who is classified by the respondent as maintenance) perform other clerical and administrative duties not directly involved with being of service to the respondent's guests. They collect the employees' completed time cards and fill in new time cards by inserting the employee's name, date and classification for use by the employees on a weekly basis. They cash out or prepare the bank deposits for several of the respondent's operations, including the buffeteria. On occasion, they will initial an employee's time card where that employee has either worked through his or her break or worked overtime and has not been able to receive authorization from his or her own supervisor, although we note that higher management must approve the initialling done by the front desk staff at a later date.

In addition to relying on their clerical and administrative duties as relevant factors in assessing their community of interest, the front desk employees are physically located in the clerical or office area of the respondent's operation and their duties do not require them to work in other parts of the respondent's premises.

The process by which the Board determines an appropriate bargaining unit has been set out in *Toronto Board of Education*, [1970] OLRB Rep. July 430 at pages 434-436 in the following terms:

14. The Board has a wide discretion pursuant to section 6(1) of The Labour Relations Act in determining what is appropriate in the facts of each case. Also section 1(1)(a) provides:

"bargaining unit" means a unit of employees appropriate for

collective bargaining, whether it is an employer unit or a plant unit or a subdivision of either or them;“.

Section 6(1) requires an appropriate bargaining unit shall consist of more than one employee. In addition section 6(2) [now 6(3)] which is concerned with craft units requires that in certain circumstances a group of employees shall be deemed to be appropriate and further section 92(1) [now 119(1)] makes special provision for determining an appropriate bargaining unit in construction industry situations.

15. It is apparent that section 1(1)(a) contemplates that an individual employer may employ persons who can be subdivided into more than one appropriate bargaining unit. It has therefore been common for a single employer to be certified for a number of appropriate bargaining units, e.g. office unit, craft unit, plant unit, sales unit, part-time unit. We emphasize the capacity for more than one appropriate bargaining unit to exist with respect to a single employer, a capacity which is statutorily confirmed by section 1(1)(a), because from time to time persons have argued before this Board that the use of the definite article in section 6(1) i.e.

“The Board shall determine *the* unit of employees that is appropriate for collective bargaining“

means that there is only one appropriate bargaining unit in each case.

16. It is also helpful to review the process of determining the appropriate bargaining unit. In each particular application the applicant trade union is required to provide a “detailed description of employees of the respondent that the applicant claims to be appropriate for collective bargaining”. (Form 1 — Rules of Procedure) The respondent employer is by way of reply, entitled to provide a detailed description of the unit claimed by the respondent to be appropriate for collective bargaining. (Form 9 [now Form 10] — Rules of Procedure) A respondent employer is further directed (Form 4 — Rules of Procedure) “If, in your reply, you propose a bargaining unit different from the one proposed by the applicant, you shall indicate on the list of employees referred to in paragraph 7 the name and classification of any person you propose should be excluded from, as well as the name and classification of any person you propose should be added to, the bargaining unit proposed by the applicant”. Accordingly, in any single application, the applicant trade union and respondent employer may make submissions that agree or disagree on all or some of the various factors concerning the appropriate bargaining unit. Where the parties disagree it is the function of the Board to decide which, if any, or part of the contending positions is proper. For example the Board in an individual application may exclude certain persons as being managerial while including others; again groups of employees may be included or excluded from bargaining units depending upon whether they share a community of interest with other employees. See e.g. *Wakefield Lighting Limited* [1965] OLRB Rep.

May 143 (plant clerical staff); *Sherman Mine, Cliffs of Canada Limited* July 3, 1969 Board File No. 15604-68-R (laboratory employees); *Affiliated Medical Products Limited* January 9, 1969 (quality control laboratory technicians). In other situations the Board may be required to exclude persons because of a statutory prohibition. See e.g. *The Corporation of the City of Cornwall* June 3, 1969 Board File No. 16166-69-R (police employees). The Board's process is a fact finding one resulting in inclusions, exclusions, accretions and deletions to the proposed bargaining units.

17. After sifting the various facts the Board must determine "the unit of employees" that is appropriate having regard to the particular situation then before the Board. The only fetters on the Board's discretion to make a determination are the requirements contained in section 6(1) that the "unit shall consist of more than one employee", *Albert Fuel Limited*, 1969 October 3, Board File No. 16685-69-R, and that the unit of employees is appropriate for collective bargaining — there are no other requirements. The unit that is appropriate is the unit that emerges after all the facts have been considered.

18. The fact finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on a viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. *Waterloo County Health Unit*, [1969] OLRB Rep. January 1016.

19. In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of The Labour Relations Act. The National Labour Relations Board in the United States had recognized in certain cases that its determination of appropriate bargaining units had "operated to impede the exercise by employees . . . of their rights of self-organization . . .". *Sav-on-Drugs, Inc.* (1961), 138 NLRB 1032; see also *Quaker City Life Ins. Co.*, (1961), 134 NLRB 960. While great weight must be given to prior cases dealing with similar situations, those cases are not dispositive of the issue in any given case. Bargaining unit determination requires a case by case review of the facts and this is compelled by the working [sic] of section

6(1) which provides that the Board “Upon an application . . . shall determine the unit of employees that is appropriate for collective bargaining, . . .”.

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21. The Board’s process therefore in determining appropriate bargaining units is not directed to certifying the more or the most appropriate bargaining unit — The Labour Relations Act only requires that the unit of employees be appropriate; the Act does not require labour organizations to seek representations in the most comprehensive or optimum groupings unless such grouping constitutes the only appropriate unit. *Cf. Federal Electric Corp.*, (1966), 157 NLRB 89; *Bagdad Copper Company* (1963), 144 NLRB 1496.

22. In conclusion we hold that where section 6(1) refers to “the unit of employees that is appropriate” it does not impose any requirement that the Board choose the more or most comprehensive unit — it only requires the Board to determine the unit of employees that is appropriate for collective bargaining having particular regard to the facts of the immediate application.

While the Board does often rely on Board practice or rules established by the Board in previous cases to guide it in determining an appropriate bargaining unit, the Board must, as counsel for the respondent advised us, decide what the appropriate unit is based on the facts before us. We are not persuaded that there is an established Board practice of excluding front desk staff from the service unit in the hotel industry. However, based on the authorities to which the Board has been referred by counsel, we are satisfied on the facts in this case that a bargaining unit of the service employees of the respondent excluding front desk staff is an appropriate unit. We are satisfied, based on the front desk employees’ overall clerical and administrative duties, taken in conjunction with their physical location within the respondent’s premises, that they do not share a community of interest with the other employees of the respondent for whom the union seeks bargaining rights. While their exclusion from these bargaining units may make it more difficult for those excluded employees to engage in collective bargaining, (and we have not considered whether the front desk employees wish to be represented by this applicant in collective bargaining at this time) we are not satisfied that the possibility that the excluded employees may not be able to engage in viable collective bargaining should override the community of interest factor.

Therefore, the Board is satisfied that the two bargaining units appropriate for collective bargaining in this case exclude the front desk staff.

The Board also notes that the applicant sought the exclusion of Stella Morrison on the same basis as the other front desk employees. We are all of the view that Ms. Morrison’s duties and responsibilities place her in a

community of interest with the employees for whom the applicant seeks bargaining rights and not the other front desk employees.

Therefore, having regard to the foregoing, the Board finds the following two units of employees:

- (a) all employees of the respondent in the Town of Newcastle save and except department heads, persons above the rank of department head, front desk staff, control clerk, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period; and
- (b) all employees of the respondent in the Town of Newcastle regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, front desk staff and control clerk,

constitute two units of employees appropriate for collective bargaining.

For purposes of clarity, the Board notes that the term "department head" refers to the head receptionist, head housekeeper, and head chef. The Board additionally notes that term "front desk staff" does not include night maintenance employees.

5. This matter is referred to the Registrar to be relisted for hearing before this panel of the Board to deal with the issues remaining in this consolidated proceeding on January 21, 1985 and February 4 and 14, 1985.

DECISION OF BOARD MEMBER, F. W. MURRAY;

1. I dissented from the Board's oral ruling in this matter, and my reasons for dissenting are set out below.

2. While I agree that the Board need only determine *an* appropriate bargaining unit and not *the* appropriate bargaining unit, I believe in this case that the exclusion of the front desk employees will unduly fragment the labour relations of the employer, and at the same time leave a group of employees, that is, three front desk employees (two full-time and one part-time) who, for all practical purposes would not constitute a viable bargaining unit. In my opinion, the Board should carefully consider in assessing whether a unit of employees is appropriate for collective bargaining *both* the group of employees that are included in the bargaining unit *and* at the same time assess the practicality of the excluded employees forming their own viable bargaining unit.

3. For these reasons I would have included the front desk employees in the bargaining units even though their community of interest with the other employees in those units may be marginal.
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0190-84-R Christian Labour Association of Canada, Applicant, v. **Jen-Ry Utility Contracting Company Limited**, Pemrow Pipelines Construction Company Limited and R. F. Wilson Limited, Respondents, v. International Union of Operating Engineers, Local 793, Intervener #1, v. Labourers' International Union of North America, Local 183, Intervener #2

Related Employer — Sale of a Business — Key employee setting up own business in face of foreseeable closure of employer's operation — Purchasing some equipment and hiring some employees — No common control and not related employer — New and parallel business not sale

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Ron Rupke and Ed Vanderkloet for the applicant; C. E. Humphrey and R. Whittington for the respondent Jen-Ry Utility Contracting Company Limited; Roy F. Wilson for the respondents Pemrow Pipelines Construction Company Limited and R. F. Wilson Limited; A. M. Minsky, Q.C., S. Tatrallyay and Ernie Ford for intervener #1; A. M. Minsky, Q.C., S. Tatrallyay, Tony Lucas and M. O'Brien for intervener #2.*

DECISION OF M. G. MITCHNICK, VICE CHAIRMAN, AND BOARD MEMBER J. A. RONSON; December 5, 1984

1. This is an application for certification in which the interveners, Locals 183 and 793, claim to already hold bargaining rights for employees of the respondent Jen-Ry Utility Contracting Company Limited.

2. The interveners allege that the respondent Jen-Ry Utility Contracting Company Limited is either a "related" employer to, or a "successor" employer to, Pemrow Pipelines Construction Company Limited, pursuant to the provisions of sections 1(4) and 63 of the *Labour Relations Act*.

3. The bargaining rights which the interveners hold for Pemrow are not disputed. Pemrow is bound to both the Mainline and the Distribution Systems agreement for its pipeline work, and the Utility Contractors' Association agreement for its utilities work. It began as a pipeline company in 1957, with two partners, and rose to become one of the 5 biggest pipeline companies in the province. In 1969 the two partners split, and Mr. Roy F. Wilson became sole shareholder of both Pemrow and a related company, R. F. Wilson Limited, which is the corporate vehicle having ownership of all of the equipment that Mr. Wilson uses in his business. R. F. Wilson rents that equipment to Pemrow as required, as well as to other contractors in the field on a regular basis. All of the business's employees are employed by Pemrow, and Mr. Wilson, through the combination of the two companies, supplies both equipment and operators to any contractors who require them. The companies carried on business out of an office and yard located on Queensway Drive in Burlington.

4. In 1971 Mr. Wilson decided to expand the utilities side of his business, which had been very small, and to that end hired Mr. Robert Whittington away from G.M. Gest. Mr. Whittington (around whom this application focuses) had been with Gest for about 6 months, following 4 years as a foreman with Cliffside Pipelayers in the Utility Division of that company.

Together, Mr. Wilson and Mr. Whittington made the rounds of the utility customers in the Hamilton/Toronto area, attempting to convince them to place Pemrow on their bid lists. These efforts were successful, and over the next 10 years Pemrow grew to become one of the top 10 utility companies in the province, with an annual volume of sales in the neighbourhood of 2 million dollars. This represented some 25 per cent of the total income of the company, whose main line of business continued to be that of a pipeline contractor. It was this side of the business that generated the most profit for the company (the utility side showed a profit only once in ten years) and to which Mr. Wilson continued to devote the bulk of his attention. He did, however, "keep a handle", as he put it, on all aspects of his business, including the utility side, and it was Mr. Wilson alone who could put his signature on all tenders drafted by Mr. Whittington, sometimes changing them before he did so. Mr. Wilson is currently also a Vice-President of the Utility Contractors' Association, and a member of the labour subcommittee which handles the negotiations with the various trades, including the interveners. The day-to-day management of the utility business, was, nonetheless, indisputably left in the hands of Mr. Whittington, to carry out the purpose for which he had been hired. Mr. Whittington maintained the contacts with customers, prepared tenders, supervised the carrying out of the work, and sat down with the customers to work out the billing. When Mr. Wilson could not attend meetings of the Utility Contractors' Association, he would send Mr. Whittington in his place, and sometimes the two men would attend together.

5. While Pemrow Pipelines prospered in the '70s, the beginning of the '80s began to show a gradual decline in profit margins, as competition from non-union and even unionized companies became more intense. Mr. Wilson made little by way of comment upon it, but it was apparent to

Mr. Whittington from the fact that Mr. Wilson stopped buying new equipment that the end of the line was approaching. The two men never really discussed it (as Mr. Whittington put it, "it was like talking about your death") but for both men "the writing was on the wall". Mr. Whittington considered what he might do to be ready for the end when it came, and decided he would be best to have a little company of his own ready to carry on in order to maintain an income for his family. Accordingly, in December of 1980 he incorporated Jen-Ry Utility Contracting Company Limited, drawing the name from his two children, Jennifer and Ryan. His "office" for the company was his home in Burlington, and he and his wife were the sole shareholders and directors.

6. Mr. Whittington then decided to get a running start at the entry of Jen-Ry into the field, bidding on jobs too small or too competitive for Pemrow to bid on. These jobs required very few men, and if Pemrow had any men idle at the time, Mr. Whittington would lease them to Jen-Ry, together with any equipment that Jen-Ry required. Otherwise, Mr. Whittington would hire his own men and equipment. On the occasions when Jen-Ry did use Pemrow men or equipment, he would invoice Jen-Ry at the same rates as Pemrow applied to any other contractor in the field. Pemrow's employees would, in those instances, be paid by Pemrow at the appropriate rates under their collective agreements. Mr. Whittington engaged one of the secretaries in Pemrow's office to do the bulk of his paperwork on a part-time basis, paying her from Jen-Ry. On at least one job Mr. Whittington, without Mr. Wilson's knowledge, ordered supplies through Pemrow from suppliers with whom he had not yet set up an account, and then had the invoices pulled for Jen-Ry's account when they came in.

7. In Jen-Ry's first year, 1981, Mr. Whittington had 4 small jobs, with a total value of roughly \$20,000 (and a profit of roughly \$2,000). At some point in the year, word of Mr. Whittington's external activities came to Mr. Wilson, and at that point Mr. Whittington

decided it might be best to go in and explain what it was he was doing. Mr. Whittington indicated the kinds of jobs Jen-Ry was taking on, and the rates at which he was charging Jen-Ry for Pemrow's men or equipment. Mr. Wilson was somewhat taken aback by these disclosures, and indicated to Mr. Whittington that he had better be careful, that it was "not in our best interest" to have Mr. Whittington bidding on work that Pemrow might have done. Mr. Wilson made no more of an issue of the matter than this, and testified that he was under the impression that Mr. Whittington cut back his "outside" operation after that. The evidence shows that Jen-Ry did in fact perform only one small job in each of the years following that, up until the time of Mr. Wilson's decision to close.

8. That decision came in March or early April of 1984. Mr. Wilson held off making a decision on his company's future until the tender results for the 1984 round of gasline contracts were announced. When the results were in fact announced, Pemrow had not been successful on a single bid. Mr. Wilson decided he had had enough, and gave the word to Mr. Whittington and the other employees that the company would clean up its existing work and then go out of business. Mr. Wilson gave instructions to get the equipment ready for sale, and brought in Wilson Auctioneers (no relation) to do a market-value assessment. Auction dates were set for August 8 and 9, but Mr. Wilson made it known that anyone could purchase items of the equipment from him at market value at any time. A number of individuals, including both Mr. Whittington and other groups of Pemrow employees setting off in business on their own, approached Mr. Wilson in this regard, and the terms of payment of the purchase price were agreed upon. Mr. Whittington bought for Jen-Ry some \$90,000 worth of equipment, of the million or so dollars worth of equipment for sale. Mr. Whittington's portion included 10 trucks of varying vintage, and assorted other equipment for the field. The terms of payment for Mr. Whittington were the same as those for other Pemrow employees who were setting up companies on their own, and that was 5 per cent of the purchase price per month, plus an interest factor, secured by chattel mortgages. Mr. Wilson testified that the extension of payment to the employees over time was to his advantage, in order to avoid "recapture" on his equipment all in one year. Mr. Whittington himself was permitted to take possession of the trucks prior to beginning payment in order to check them out and prepare them for certification. Asked in cross-examination whether he was allowed by Mr. Wilson to select "the cream of the crop", Mr. Whittington replied: "I wish that were true", and from Mr. Wilson's own reaction, the Board is satisfied that Mr. Whittington was not in fact afforded that prerogative.

9. Mr. Whittington had in mind to take some of the staff of Pemrow with him, and other employees out of a job on the closing of Pemrow also approached Mr. Whittington, with the result that roughly half of the work force that Jen-Ry employed by the summer of 1984 was made up of former employees of Pemrow, including two of its foremen and a lead hand. One of the foremen, in particular, Mr. Whittington had brought with him in 1971 as an employee from Cliffside. Mr. Whittington transferred the company's office from his home to Richmond Hill, in order to be closer to the Toronto end of the business, where he felt the bulk of the opportunities lay. The Pemrow decals were removed from all of the purchased equipment, and the trucks were painted in Jen-Ry colours. What other equipment and small tools were needed by Jen-Ry were purchased by Mr. Whittington or his employees from other sources. Mr. Whittington also purchased an additional trenching machine at Mr. Wilson's August 8th auction. All of the financing for Jen-Ry's expanded operation came from Mr. Whittington, including a \$35,000 pay-out from Pemrow's Deferred Profit-Sharing Plan. That was a discretionary plan put into effect some years prior under which the 20 or 25 senior-most employees in the firm would receive a year-end bonus of \$2,000 or so, if Mr. Wilson considered the company's year had been financially successful.

10. There is no question but that the kind of work done by Jen-Ry at its inception was the same kind of work traditionally done by the utilities division of Pemrow, except that the jobs were smaller, and were ones that Pemrow, with its overhead, could not have bid competitively on. Nor, the evidence of both Mr. Whittington and Mr. Wilson is, was Pemrow likely to have wished to, because the size of the jobs would have required the assignment of a portion of a crew, leaving the remainder of the crew with no foreman. Some of these small jobs in the early stages of Jen-Ry were not for public utilities, but came rather through personal friends or contacts of Mr. Whittington. After the shutdown of Pemrow, however, the customers that Mr. Whittington approached for projects on a larger scale were in many cases the same customers that he had worked with at Pemrow, there being only a limited number of public utility commissions in the area, together with Bell Canada. Once again Mr. Whittington made the rounds of the various customers, as he had done with Mr. Wilson in 1971, explaining the circumstances of his company and trying to get onto their regular bid list. A sample of the kind of letter he was putting out in this regard reads as follows:

May 3/84

Brampton Hydro
129 Glidden Rd. Brampton, Ontario
L6W 3L9

Attention: Mr. J. McKenzie

Dear Sir:

Please find enclosed a letter from E.U.S.A. to confirm that Jen-Ry Utility Contracting Co. Ltd. is a member in good standing. The Workmen's Compensation Board agrees and we are under #3888770, see attached confirmation.

Our liability insurance policy is for \$1,000,000.00 and is number 5886489.

Our automobile liability insurance is also for \$1,000,000.00 and is Number B 8059732. There is a cargo policy #N4607288 for \$5,000.00 as well. All this insurance is with the Royal Insurance company.

We have purchased the necessary equipment to run four complete crews in joint use, duct and manhole or conversion work. The supervisory staff have an average of 15 years experience in all facets of Utility work. They have worked for Brampton Hydro, North York Hydro, Bell Canada, Scarborough P.U.C. and Burlington P.U.C. We have been accepted for the bid lists for Burlington P.U.C., Bell Canada and North York Hydro.

We trust the above information is sufficient for your needs and we look forward to being accepted as a contractor for your bid list.

Should you require any additional information, I can be reached at 689-

8246. We will be moving to Richmond Hill on May 14/84 and at that time will forward new address and Phone Number.

Trusting we may be of service to you in the near future.

Yours very truly,

JEN-RY UTILITY CONTRACTORS CO. LTD.
Robert Whittington, President.

11. One of the first utilities approached directly by Mr. Whittington was North York Hydro, with whom Pemrow had held the service contract the year previously, as well as having successfully bid on it about 5 years prior. Pemrow's trailer was in fact still on North York's property. Jen-Ry submitted the lowest tender for the upcoming contract, and Mr. Whittington said his efforts to convince the people at North York Hydro to give Jen-Ry a chance were going really well, until his tender got to the top man. It was then decided that rather than put all of their eggs in Jen-Ry's basket, the contract would be split, with half going to one of the established firms, Black and MacDonald. Mr. Whittington then arranged with Mr. Wilson to purchase Pemrow's trailer, rather than have Mr. Wilson move it.

12. From all of the above, the intervenor unions argue that both sections 1(4) and 63 are applicable, and that their bargaining rights with Pemrow apply to Jen-Ry.

13. Section 1(4) of the *Labour Relations Act* provides:

Where in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The issue in the case before us is "common control or direction". The interveners point to the close working relationship between Pemrow and Jen-Ry in Jen-Ry's start-up days, and the direction exercised by Mr. Whittington over the field activities of both companies, to establish what they say is the kind of common control or direction contemplated by the section. The interveners point to *Donald H. Foley*, [1980] OLRB Rep. April 436, *J. H. Normick*, [1979] OLRB Rep. Dec. 1176, and the more recent *Kennedy Lodge*, [1984] OLRB Rep. July 931, as an indication of the Board's willingness to look beyond the appearance of independence between two corporate entities to the seat of real control over an economic activity, in applying the provisions of section 1(4). The interveners also cite *Del Zotto Enterprises Limited*, [1974] OLRB Rep. Aug. 533, as an indication that the Board has come to place emphasis on the word "direction" as opposed to "control" in finding the necessary relatedness between two interconnected activities.

14. None of these cases, however, bear an analogy to the present case. In *J.H. Normick and Kennedy Lodge*, the Board found that the original entrepreneur had merely set up the *appearance* of an independent intermediary as a means of avoiding his own collective bargaining obligations, but without having given up *de facto* control of the whole enterprise in any meaningful sense. The original entrepreneur, as counsel for Jen-Ry put it, “continued to call the shots”. Similarly, in *Foley*, the subcontractor was found to have been so inextricably bound up in the operations of the general, from whom it received 85 per cent of its business, that the Board found it to have no economic life or control over its fortunes of its own, even to the point where the line of control over employees of the subcontractor had been blurred. The Board observed, at paragraph 27, that there was nothing sinister in the fact that a “number of the arrangements between the two companies could be viewed as enterprising (or at least novel) accommodations between two entrepreneurs, *if there was otherwise an arm’s-length relationship*. “But“, asked the Board, “how do these arrangements look in the context of the total relationship?”:

Kingston Sand started getting business from Foley almost coincident with the birth of Mr. Cameron’s idea to start a second company and six weeks before he moved to incorporate in the name of Kingston Sand. Within seven months from the idea, Kingston Aggregates had done \$815,000 work of business with Foley, 85% of its total business for the year. Add to this picture the lack of evidence that Kingston Aggregates is capable of being in an arms-length contractor/sub-contractor relationship with Foley; the evidence that there is substantial, functional interdependence between the two companies and the indicia herein of other elements of common control and the economic reality of the relationship emerges as Foley exercising common control over Kingston Aggregates. In fact, one effect of that control is that there is no need for Kingston Aggregates to hold itself out to the public as a business in the usual manner. While Foley did not have any shareholdings in Kingston Aggregates, directly or beneficially, its providing of 85% of Kingston Aggregate’s working capital may be seen, in the context of all the other elements of their relationship, as being the reasonable equivalent of an ownership position.

These findings of inter-dependency, particularly with respect to the source of work, bear no analogy to the present case, as will be further discussed below.

15. And finally, in *Del Zotto Enterprises, supra*, the Board found such indiscriminate use of the various corporate names involved or including the re-copying of employee work hours from the time cards of one company to another, that it was prepared to assume the existence of a single family of “related” companies, notwithstanding a lack of evidence of the corporate details. The Board wrote:

12. When one reviews the evidence concerning the contractual relationship, the appearances at the job site and the use of the various company names with no apparent care as to when such company names are used, one can indeed draw the conclusion that it is only when such companies are under common direction, can such corporate names be used interchangeably. Indeed, the most telling evidence in this regard is the evidence of the employee relating to his time card. In effect we have an agent of Sardina Investments changing the name on a time card from Demiro Construction

Limited to Zaph Construction Limited without the knowledge of that employee. It is indeed inconceivable that company A can change a time card made out in the name of company B to the name of company C unless there is some common direction of the affairs of those three corporations. To suggest that these are three separate entities using separate agents and employees is to make a mockery of the idea of corporate structure much less a mockery of section 1(4) of the Act, and we are therefore of the view that certain of the respondent companies should properly be treated as one employer within the meaning of section 1(4) of the Act. . . .

It is apparent, therefore, that notwithstanding the Board's choice of the word "direction" rather than "control" in the passage above, the case adds nothing to the normally-accepted concept of "common control or direction" under the section.

16. All of these cases make it clear that the test for "control" under section 1(4) of this Act envisions the ultimate power to "call the shots" where necessary, as counsel for the respondent put it, with respect to the labour relations of the two enterprises, and not simply the authority and responsibility to direct the activities of employees in the field. Were it otherwise, a totally independent and established company hiring the manager of field services from another company would inevitably find itself in the position of being a "related employer" for the purposes of the *Labour Relations Act*. Rather, we accept the submission of the respondent that the section contemplates a point of central decision-making control with the ultimate power to, for example, say "yes" or "no" to a wage proposal from the union for both entities. Such power, as the Board cases show, may come simply from the legal relationship between the two entities, (e.g., *Great Atlantic & Pacific Company Limited, A & P Drug Mart Limited*, [1981] OLRB Rep. March 285) or from a total lack of independence in practical or economic terms, (e.g. *J. H. Normick, Foley, supra*, and even *Brant Erecting & Hoisting*, [1980] OLRB Rep. July 945,) or it may come from a combination of the two, (*Kennedy Lodge, supra, Penmarkay Foods Limited*, [1984] OLRB Rep. Sept. 1214).

17. There is simply no basis, in the present case, to equate Pemrow Pipelines Construction Company Limited with Jen-Ry Utility Contracting Company Limited. The former was clearly "Mr. Wilson's company", and the latter just as clearly "Mr. Whittington's", and no link whatever of either common ownership or ultimate authority existed between the two. There is no question, e.g., who would have had the final say at Pemrow on the wage rates (in the absence of collective agreements) for the employees of that company, and that is not the same individual who would be exercising that power at Jen-Ry. Notwithstanding the closeness of the relationship between the two operations in Jen-Ry's early years, owing to Mr. Whittington's privileged position, there is no doubt that Mr. Wilson could have asserted his independence with respect to the affairs of Pemrow at any time he wanted to, and Mr. Whittington likewise for the affairs of Jen-Ry, as he ultimately did. While Mr. Whittington obviously took advantage of certain conveniences while he remained in the employ of Pemrow Pipelines, none of that early business of Jen-Ry came to it by virtue of the existence of Pemrow Pipelines, and the viability of Jen-Ry as a contractor in the field was in no way dependent upon the continuation of its relationship with Pemrow.

18. What the wide latitudes enjoyed initially by Mr. Whittington in the operation of the two companies does do is to raise a question about the relationship between the two, but we find this question to have been unequivocally answered by the evidence. From the testimony and demeanour of the two respondent witnesses, the Board has no doubt that Mr. Wilson and

Mr. Whittington, although obviously long-time associates in Pemrow Pipelines, did in fact operate at “arm’s length” in their financial relationship, and that no hidden mechanism existed or exists to re-direct any part of the profits of Jen-Ry back into the hands of Mr. Wilson. If Mr. Wilson tolerated (as it appears he did) the rather unusual activities of Mr. Whittington as he began to gear up, perhaps a little prematurely, for the demise of Pemrow, we are satisfied that Mr. Wilson did so only out of a basic trust that Mr. Whittington would not cross the line of bidding on jobs that Pemrow itself could successfully bid on, and that Mr. Whittington would also cut back on his entrepreneurial activities, as Mr. Wilson had cautioned, and as Mr. Whittington did in fact do. We find on the evidence that Roy Wilson, the controlling mind of Pemrow, retained no element of either authority or beneficial interest in the spin-off company, Jen-Ry, and the interveners’ request to have the provisions of section 1(4) applied to Pemrow Pipelines and Jen-Ry Utility Contracting Company Limited is accordingly dismissed. For a similar case in this respect, where the evidence before the Board also failed to disclose such a relationship between the companies of two brothers formerly associated in business, see *Rivard Mechanical*, [1981] OLRB Rep. May 550.

19. Do the provisions of section 63 offer the interveners any relief here? Section 63 provides in part:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

If section 1(4) raises interpretative problems of the meaning of “common control or direction”, section 63, with its broadly-defined term “sale”, and its undefined term “business”, does so all the more. As the Board commented, for example, in *The Tatham Company Limited*, [1980] OLRB Rep. March 366:

26. All of the cases to which we have referred recognize that there are no easily administered mechanical tests which permit the Board to readily distinguish between a “mere sale of assets” and a sale of “part of a business.” As the Board commented in *Metropolitan Parking, Inc.*, [1979] OLRB Rep. Dec 1194 at paragraph 34:

“This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a ‘business’ or ‘a part of a business’ and the transfer of ‘incidental’ assets or items. In case after

case the line has been drawn, but no single litmus test has ever merged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided.”

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successor issue arises. Factors which may be sufficient to support a “sale of business” finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets — physical plant machinery and equipment — may be of paramount importance; while in others it may be patents, “know-how”, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. The *Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

As the Board has also noted, the construction industry is a good example of an industry where the essence of the business often tends to reside in its “intangible” assets, such as the experience and expertise of its management. A particular location or collection of tools may be interchangeable with any other location or collection of tools, and may contribute nothing to the “goodwill” or ability of the business to attract the work.

20. In addition, once having identified what the essential elements of a particular business are, the Board must also find under section 63 that a “sale” or “. . . other manner of disposition” of those essential elements has taken place from one employer to another. As the Board put the question in *Metropolitan Parking Inc.* [1979] OLRB Rep. Dec. 1193, at paragraph 38:

Is the transfer, if any, from the predecessor merely incidental, or is it integral, to the successor’s ability to produce the goods or supply the services formerly produced by the predecessor?

And further, at paragraph 44:

44. For a transaction to be considered a “sale of a business” there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of

the business as a block or as a "going concern." A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfer *his* business. The use of the active verb and possessive pronoun is not insignificant.

The need for such a link between the predecessor and alleged successor has been recognized, and the principles of *Metropolitan Parking Inc.* adopted, by other labour boards in this country; see, for example, the comprehensive review of the history of the Canada Labour Code's successorship provisions in *Freight Emergency Ltd.*, 84 CLLC ¶16,031; and also *Cafas Inc.*, 84 CLLC ¶16,034. In many cases in the construction industry, relief for the trade union, if it exists at all, must be found in the provisions of section 1(4), which focuses on the continuing role of the example in *Carroll Electric (1982) Limited*, [1982] OLRB Rep. Dec. 1814, at paragraph 11, reiterated the comments of the Board in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, and stated:

... Section 1(4) differs notably from section 63 in that there need not be a transfer of "business" from one employer to the related employer. For this reason section 1(4) has been mainly useful in the construction industry where many of the employers generally do not have the permanence of an investment in a fixed plant and equipment characteristic of a manufacturing concern. A small construction company can move from job site to job site or place to place, assembling tools, equipment and a labour force as required *after* it has made a successful bid. There may be no established economic organization, labour force or configuration of assets. A single principal or configuration of principals may have several companies which are used, more or less interchangeably, so that bidding is done and work performed through whichever company is convenient. Similarly, where capital requirements are minimal and business relationships transitory, it is relatively easy to wind up one business, and create another one which carries on essentially the same business activity as before (*Brant Erecting and Hoisting*), [1980] OLRB Rep. July 945 at paragraph 13). In such circumstances there would be a continuation of the same business activity without any indicia of a "sale of business" i.e., the apparent disposition of assets, inventory, trade names, goodwill, employees, etc. Section 63 has been largely useful in the industrial sector of collective bargaining where usually there are dispositions of assets, inventory, trade names, goodwill and employees, to name only partially the list of indicia the Board has looked to in order to determine whether a "sale" has taken place.

21. Whether the Board has been able to find a "sale of a business" in the construction industry as well, in the transfer of various and assorted assets from one employer to another, has been largely a matter of degree. Where, for example, a father packages up for transfer sufficient of the elements of his business, including the goodwill found to have been built up in the family name, so as to ensure a continuation of the business in the hands of his son, the Board has had no difficulty in finding a "succession" in every sense of the word. See *Carroll Electric (1982) Limited*, *supra*; *Mortlock Enterprises Limited*, [1978] OLRB Rep. July 662.

In *The Tatham Company Limited*, [1980] OLRB Rep. March 366, the employees who in fact had come to be the key players in an enterprise where age had gradually reduced the role of the owners and founders, purchased sufficient of the assets from their employer to permit them to continue to operate the same kind of business, from the same location, using the same telephone number, the same equipment and the same service-yard as the vendor company. The Board concluded on balance that a "sale of a business" had taken place, notwithstanding the fact that little goodwill attached to the predecessor's business at that point in any event, and that contracts in that line of business were secured largely on a low-bid basis. And in *Doran Construction Limited*, [1984] OLRB Rep. Aug. 1108, the vendor company not only delivered its equipment, office space and telephone number to the purchaser, but actually sold as well the services of its three key individuals, the principals in the company, for the one-year start-up period of the successor.

22. On the other hand, in *Braneida Mechanical Service Ltd.*, [1981] OLRB Rep. Aug. 1102, a large plumbing and heating contractor in Brantford, Oliver Plumbing and Heating Limited, announced that it was closing up shop, and two of its employees decided to incorporate a company of their own, rather than go to work for another established firm. One of the employees was a journeyman mechanic, and the son of the owner of the dissolving company, and the other was engaged in preparing estimates and doing sales work. The two bought some \$8,000.00 worth of equipment from their employer, prior to the employer's auction, and arranged to lease 5 of the 9 vehicles under lease to the employer. The two also purchased miscellaneous tools and supervisor and 4 other employees, including a foreman, of a dissolving contractor bought some trucks from their employer and set up business in another part of Ottawa. The field supervisor was the brother of the owner of the predecessor company, and had gotten to know the first substantial customer of the new company through his work in his equipment from other sources, and set up shop under their new name in a different part of Brantford. They took with them an estimator, a bookkeeper, 3 mechanics, and a service-work plumber who also were unemployed as a result of their employer's closure. In their solicitation letters to potential customers, the two new entrepreneurs described themselves as having been formerly with Oliver Plumbing and Heating, and obtained jobs that were similar to, but smaller than, the work that Oliver had done. Some of that work came from former customers of Oliver. The Board found that the "business" of Oliver had not been sold to the new company, but rather that the two former employees of Oliver had set up a new and parallel business of their own. Similarly, in *Rivard Mechanical*, [1981] OLRB Rep. May 550, the field brother's company. The Board accepted the evidence of the customer, however, that the new company was awarded its contract strictly on a competitive bid basis. The Board found no "sale of business" to have taken place.

23. Here Mr. Whittington took with him to Jen-Rysome of the redundant equipment of Pemrow, together with a number of equally redundant employees, including members of Pemrow's field supervisory staff (at least one of whom Mr. Whittington brought with him from Cliffside). But while it is apparent that no business can function without these elements, it is equally apparent these are not the *significant* elements in successfully acquiring work, or distinguishing one "business" from another, within this industry. This is essentially a "bid" industry, and what is critical are the human factors of experience and expertise in estimating, together, in some measure, with general recognition in the industry. The present case features these important elements of expertise and recognition in the industry residing, not in an owner or "principal" of the business, but in an *employee* to a degree not seen in any of the cases previously decided by the Board. If the essence of an individual "business" is found to reside in such a "key" employee, and that employee moves to a new company, (of his own, or

otherwise), can it be said that a transaction amounting to a "sale" from one employer to the other has taken place? Or, conversely, as Mr. Vanderkloet put it, is an employee's own experience and reputation his to trade on as he may, without attracting labour-relations consequences? The Board does not find it necessary to decide the question in those terms here. On all of the evidence, the Board finds in this case that the utility business of Pemrow Pipelines was not in any event so completely identified with the person of Bob Whittington as to equate his movement with the movement of the "business" of Pemrow Pipelines. Rather, the Board finds that Roy Wilson, while largely in the background with respect to the utility side of his business, nonetheless continued to be a dominant factor in the overall management, public recognition, and "goodwill" of that business. Mr. Wilson was himself a Vice-President of the Utility Contractors Association, and the standing member on its labour-relations subcommittee. Mr. Wilson was never out of touch with the activities his utility business was involved in, and at all times exercised the right to approve (and alter) any tenders. Mr. Whittington, on the other hand, was known in the industry for his expertise not only at Pemrow, but at Cliffside and G.M. Gest before that. But even that did not help him simply to step into the shoes of Pemrow when it vacated the scene. Notwithstanding his long association with North York Hydro, for example, as an employee of Pemrow, Mr. Whittington on his own, without the size and proven entrepreneurial ability of Roy Wilson and his company, was unable to persuade Hydro to risk all of its tendered contract in his hands, in spite of the qualifying competitiveness of his bid. Clearly Jen-Ry, representing Bob Whittington in business on his own, was not the equivalent in the eyes of the public of the well-established business of Pemrow Pipelines for whom Mr. Whittington was long known to have worked.

24. In summary, the Board finds that Mr. Whittington was not able, through the purchase of certain of Pemrow's equipment and the hiring of certain of its employees, to acquire the utility "business" which had been developed and carried on by Pemrow Pipelines. Rather, the Board finds that Mr. Whittington used those assets to set up and operate a new and parallel business of his own, and the interveners' application under section 63 of the Act is dismissed as well. With the rejection of both this and the application under section 1(4), the argument which the interveners made on the *April Waterproofing* line of cases of course falls as well.

25. Should the interveners claim status to make representations to the Board with respect to any other issues in these proceedings, they are directed to file with the Board written argument in support of such status not later than December 31st, 1984. Otherwise, the Board will proceed to dispose of the application on the basis of the material before it.

DECISION OF BOARD MEMBER B. L. ARMSTRONG;

1. This is an application for certification in which the interveners Local 183 and 793, claim to hold bargaining rights for employees of the respondent Jen-Ry Utility Contracting Company Limited.

2. The interveners have a collective agreement with Pemrow Pipelines Construction Company Limited and allege that the respondent Jen-Ry Utility Contracting Company Limited is either a "related" employer to, or a "successor" employer to Pemrow Pipelines Construction Company Limited pursuant to the provisions of Section 1(4) or 63 of the *Labour Relations Act*.

3. Mr. Robert Whittington, the President of the respondent Jen-Ry Utility Contracting Company Limited, was hired by Pemrow Pipelines Construction in 1971 to expand the

companies Utilities Division, and with the President of Pemrow, Mr. Roy F. Wilson, built Pemrow to one of the top ten Utilities Companies in Ontario. The day-to-day management of the utility business was left in the hands of Mr. Whittington; he maintained contact with the customers, prepared tenders, supervised the work and worked out the billing with customers.

4. In December 1980, Mr. Whittington incorporated Jen-Ry Utility Contracting Company Limited, and decided to bid on jobs he felt were too small or too competitive for Pemrow to bid on. He would use Pemrow men and equipment, he also hired one of the secretaries from Pemrow's office on a part-time basis. He would also issue invoices to Jen-Ry from Pemrow for their services.

5. In 1984 Mr. Wilson decided he would go out of business and put his equipment up for sale. Mr. Whittington purchased some \$90,000 of the equipment, trucks and other equipment for the field. The kind of work done by Jen-Ry is the same work traditionally done by Pemrow Utility Division and I find that a sale of a business took place from "Pemrow" to "Jen-Ry" under section 63. I would have found that Jen-Ry is deemed to be the successor employer and the bargaining rights with Pemrow apply to Jen-Ry. The application for certification of the Christian Labour Association of Canada would therefore be untimely and the applicant is without status.

6. The Board has always construed the term "sale" broadly in view of the collective bargaining purpose which the concept of successorship was designed to achieve.

Section 63(1).

(a) "business" includes a part or parts thereof;

(b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

7. The Board decision in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, contains a detailed discussion of the history, purposes and application of Section 55 (now 63). At paragraph 19 of that decision, the Board stated:

In the absence of a successor rights provision any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business, its transfer to other individuals, or a change in a partnership, would all effect a change in "the employer" even where the plant equipment, products and work force remain substantially the same. The employees might find themselves working at the same plant, at the same machine, under the same working conditions, with the same supervision, doing exactly the same job as before, but as a result of a transfer (of which they may not even be aware) their collective bargaining rights and their collective agreement would disappear. Section 55 avoids this destruction of bargaining rights and prevents a dislocation of the collective bargaining *status quo* by transforming the institutional rights of the union and the individual rights of the employees, (both of which are grounded upon the statute) into a form of "vested interest" which becomes rooted in the business entity, and like a charge on

property, "runs with the business." In *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733 the Board described the effect of section 55 as follows:

"Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

8. The application for certification should be dismissed.

0322-83-U John (Jack) James, Complainant, v. Labourers' International Union of North America, and its Locals 493 and 527, Respondents, v. O. J. Pipelines Ltd., Intervener

Duty of Fair Representation — Reconsideration — Prior decision refusing late request to amend complaint — Dismissing for failure to disclose prima facie case — Circumstances where reconsideration appropriate reviewed — Application denied

BEFORE: N. B. Satterfield, Vice-Chairman.

DECISION OF THE BOARD; December 17, 1984

1. A letter from the complainant John James dated June 18, 1984 has been received by the Board. The letter, which is set out later in the decision, appears to be a request for reconsideration of a decision in this matter which issued March 16, 1984. That decision dismissed a complaint that the respondents had violated sections 68 and 69 of the *Labour Relations Act*. It was dismissed because the complaint failed to disclose *prima facie* a violation of either section by any of the respondents. The decision was rendered orally at a hearing into the complaint after the Board had withheld consent to James to amend the complaint to include the allegation that the respondent Local 493 had failed to pursue a grievance. The decision which issued March 16th confirmed the oral decision.

2. James filed another complaint on March 27, 1984 (Board File No. 3085-83-U) which came on for hearing by the Board, differently constituted, on May 14, 1984. The respondents and the intervener herein were named as respondents to the complaint. A decision of the Board which issued June 4th, 1984 described the complaint as a carbon copy of the first (instant) one, "... involving the same parties and arising out of exactly the same facts.". It found that the dismissal of the original complaint was a complete bar to the second complaint and dismissed it. That decision concluded with the following paragraph:

5. The only avenue now open to the complainant is to apply for reconsideration of the earlier decision. An application for reconsideration is assigned

to the panel that issued the original decision. But such a request will not be granted unless the applicant brings forward evidence that was not available at the time of the original hearing or advances arguments that could not reasonably have been made at that stage. A request for reconsideration should be addressed to the Registrar and should fully describe the evidence and argument upon which the applicant relies. The Board may dispose of such an application on the basis of the written application without convening a hearing.

3. James' letter followed upon the issuing of that decision. The text of his letter is set out below:

I am applying for reconsideration of the earlier decision of case file #3085-83-U on the grounds that I did not receive the letter from the Board, of February 23/84 and I notified Rene Brixhe who in turn notified Mr. Satterfield of same. Also no mention is given to the fact that it was the fault of the Registrar for the time elapse and he failed to notify the International Labourers Union twice, once for June 13/83 and then again in Dec. 22/83. Further take note that it was brought up that Local 493 was not in the original complaint because I was given to understand they were proceeding on a grievance on my behalf later to find out it was a farce as the grievance went to the Pipeline Contractors Assoc. of which O. J. Pipelines were not members and my Local 493 knew this at the time. No. (2) of the oral decision concerning Local 527 "the number of men out of work" has no bearing on the steward who was appointed to the completion of the job, enclosed documents of referral letter for this point. Enclosed also is pre-job conference report and copy of the grievance letter.

Why was the fact a barr [sic] is commonly placed after a boards [sic] decision was not mentioned in the original decision and why was the hearing scheduled a second time if the case was the same one?

How the tribunal could justify this dismissal is beyond the scope of reasons.

4. The Board, as constituted herein, treated James' letter as a request for reconsideration of its March 16th decision in the instant case and referred copies of it to the respondent and intervener for comments. The texts of their responses and James' reply to them are as follows:

- (1) Text of reply dated July 3, 1984 from the solicitors for the intervener:

We are in receipt of the Applicant's Request for Reconsideration dated June 18th, 1984 and have the following comments to make in respect thereto.

We would first indicate that we take it to be settled that a Request for Reconsideration of a Board decision will not be granted unless new evidence is brought forward which was not available to the Applicant at the time of the original hearing or unless arguments are put forward that could not reasonably have been made at the time of the original hearing. This position is made clear in the concluding paragraph of the Board's decision in this case dated June 4th, 1984.

In our submission, the Application for Reconsideration that has been made by the Complainant is not based upon any new evidence not available to the Complainant at the time of the original hearing, nor are any arguments advanced that could not or have not been made at an earlier stage in these proceedings.

The Complainant has simply repeated again the same arguments that he has already made in respect of this matter. Once again, reliance is placed on the alleged failure to receive the Registrar's letter of February 23rd, 1984 requesting further particulars in this matter. It would appear that this is done by the Complainant to once again explain why it is that no reference was made in the original complaint to any failure on the part of Local 493 to process a grievance filed on the complaint's behalf. Once again, reliance is placed on the letter of January 20th, 1982 appointing the Complainant as Steward on the job site and the pre-job conference report in this regard in respect of the Complainant's position and the alleged violation of Section 69 of the Act by Local 527.

In short, the same submissions that were made by the Complainant at the hearing on March 7, 1984 have been repeated in the Application for Reconsideration. No new evidence nor new submissions that were not available at the time of the March 7th hearing have been put forward.

We would again remind the Board that the complaint was originally filed and particularized in May of 1983. The Complainant was then invited to clarify his position at the first day of hearing in this matter which took place on June 13th, 1983. A second hearing was then held on January 31st, 1984. A third day of hearing was then held on March 7, 1984. As a result, even if the Complainant did not receive the request for particulars dated February 22, 1984 as he has alleged, he has had more than ample opportunity to clarify and explain the full nature and extent of his claim. Notwithstanding this, it was not until March 7, 1984 that any kind of clarification and particularization was attempted by the Complainant.

In these circumstances, and in light of the clear requirements that have been set if any Application for Reconsideration is to be granted, we would respectfully submit that the Application in this case should be refused. All of which is respectfully submitted.

(2)Text of the reply dated July 9, 1984 from the solicitors for the respondents:

We are solicitors for the Labourers' International Union of North America ("the International" and its Local 493 ("Local 493") and 527 ("Local 527").

We acknowledge receipt of a copy of a letter addressed to you dated June 18, 1984 from Mr. John Jack James ("James"), wherein James has applied for reconsideration of the Board's decision in OLRB File 3085-83-U ("the Second Decision"). The Second Decision was made following the dismissal

of Mr. James' first Application in Board File 0322-83-U ("the First Decision").

We are uncertain, from the wording of James' Letter, whether he wishes reconsideration of the First or the Second Decision. In any event, on behalf of our clients, we are instructed to oppose the Application for Reconsideration and ask that the Board deny the said Application in respect of *both* the First and the Second Decision.

The application does not advance any new arguments, nor does James submit that he wishes to adduce evidence which was not available to him at the time of either hearing.

Mr. James raises the following matters in his Application for Reconsideration, which we deal with below:

- (a) He did not receive a copy of our letter from the Board dated February 23, 1984 requiring him to file particulars of his allegations against Local 493;
- (b) Local 493 was not named in the original Complaint because James was given to understand that the Local was proceeding on a grievance on his behalf;
- (c) With respect to Local 527 and "the number of men out of work", this has no bearing on James, who was a steward and was appointed until the completion of the job.

I. The letter for Particulars
dated February 23, 1984

The first Complaint, which is dated May 10, 1983, did not list the International and Local 493 as parties. James sought to add these parties at the hearing on January 31, 1984, but filed no allegations against them. A request for particulars was made by our firm, which was forwarded by the Board to James, by letter dated February 23, 1984 (see First Decision, paras. 8(2) and (3)). James now claims that he did not receive this letter from the Board.

The First Decision, at para. 7 thereof, indicates that counsel for the Respondent Local Unions moved that the Board dismiss the Complaints on two grounds, including the Complaint being so deficient in particulars with respect to both Locals, but especially regarding Local 493, that the Respondents could not tell what case they would have to meet. In respect of such motion, the Board found, at para. 8 of the First Decision, that:

"The Board heard the *full* submissions of the parties on the Motion".
(*emphasis added*)

James' failure to provide particulars and respond to our request for particulars was a major issue before the Board on the Motion. James was given

a full opportunity to reply to the argument made by Local 493 that he had not raised any allegations against it or provided any particulars of such allegations. At no time did James advise the Board, despite extensive discussion in the hearing room with respect to the matter of particulars, that he had failed to receive any notice with respect to providing particulars. We further point out that in his second Application dated March 27, 1984, James makes no attempt to explain that he failed to receive any notice with respect to particulars in the first application.

We further draw the Board's attention to Section 113(1) of the Ontario *Labour Relations Act*, which provides:

"For the purposes of this Act and of any proceedings taken under it, any notice or communication sent through Her Majesty's mail shall be presumed, unless the contrary is proved, to have been received by the addressee in the ordinary course of mail."

At the hearing before the Board on March 7, 1984, James made no mention of his failure to receive the request for particulars, nor did he prove that he had not received the request, although such request for particulars was a major issue in the Motion before the Board.

II. Local 493 was not in the Original Complaint because they were proceeding on a Grievance

The reasons for the exclusion or inclusion of Local 493 from James' Complaint are not relevant to the determination of the Board. In any event, James chose to add Local 493 as a party in January of 1984, but made no allegations at that time and did not mention the matter of a grievance filed on his behalf until the hearing of March 7, 1984.

III. Allegations against Local 527 regarding Failure to Refer James

In the First Decision, the Board found, at para. 8(7), that:

"With respect to the allegation that Local 527 violated Section 69 of the Act by not referring James to the pipeline job, the Complaint, as filed, accepts that Local 527 refused to refer James because the Local. . .'had hundreds of members out of work'. The statement was not disputed by James and, in itself, the statement is a complete defence against the allegation."

The Board, in the Second Decision, at para. 3, found that:

"The original panel dealt with the Section 69 Complaint on its merits and decided that there had been no violation. Although the Board is not strictly bound by the common law notion of *res judicata*, the

practice is not to allow a complainant to relitigate a matter which has been dismissed on its merits.”

(See Second Decision at para. 3.)

There was no evidence before the Board that Local 527 breached any duty under Section 69 of the Act in respect of James, nor has James presented any new evidence to that effect in his request of reconsideration.

IV. Applicable Legal Principles on Reconsideration

The Board has set out its policy on reconsideration in *Canadian Union of General Employees* [1975] OLRB Rep. (April) 320, where the Board stated at p. 324:

“Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representation or objections not already considered by the Board that he had no opportunity to raise previously. (*International Nickel Co. of Canada Ltd.* [1963] OLRB Rep. 234, 64 CLLC para. 15, 493 (Ont. H.C.); *Detroit River Construction Case* (1962) CLLC para. 16,260). Both legs of this principle depend upon the applicant having been diligent and therefore having had no opportunity to draw the Board’s attention to the object of its concern.”

The Board in the *Canadian Union of General Employees* case elaborated on the rationale for such a principle at p. 325, as follows:

“One of the principal purposes of an administrative agency is to process the matters that come before it with expedition and economy. These values can only be achieved if there is finality to the Board’s decision in the vast majority of cases.”

More recently, in *Auto Jobbers Warehouse Ltd.* [1982] OLRB Rep. (May) 649, the Board denied reconsideration where an employer sought to “repair deficiencies” in its initial case, where it was not represented by legal counsel. The Board held, at p. 649:

“Although the respondent was represented by counsel at the hearing into the request for reconsideration, it was not represented by counsel when Miss Beattie’s complaint was heard on its merits. In support of the request for reconsideration, counsel submitted that during the initial hearing the Board had not been appraised of the true facts relevant to the proceedings, and accordingly, the respondent now desired to put certain additional evidence before the Board. Counsel submitted that the Board should entertain this additional evidence in that the respondent had not felt a need to retain counsel prior to the

initial hearing primarily because of its belief that it could rely on the report of the inspector. We are unable to accept this submission. The parties were advised that the initial hearing was for the purpose of hearing the evidence and representations of the parties with respect to the complaint. Further, it is not contended that the evidence the respondent now seeks to call was not available to it at the time of the initial hearing. Prior to the initial hearing, the respondent apparently did an assessment of the merits of the complaint and, on the basis of that assessment, decided not to retain counsel. In our view it is not open for the respondent to now seek to have the matter relitigated this time with the assistance of counsel. *We do not believe that the Board's reconsideration power was intended to be exercised for the purpose of permitting a party to repair the deficiencies of its case.* Indeed, if such were the practice, proceedings before the Board would be interminable and decisions inconclusive." (*emphasis added*)

V. Conclusion

It is the submission of the International and Locals 493 and 527 that there must be an end to this litigation. James has raised nothing in his letter for reconsideration that was not otherwise available to him at the time of the initial Board hearing or could not have been obtained by reasonable diligence. Reconsideration is not for the purpose of repairing deficiencies in James' initial case.

As indicated in the Second Decision, a request for reconsideration will not be granted unless the Applicant brings forward evidence that was not available at the time of the original hearing, or advances arguments that could not reasonably have been made at that stage. The Board further requires that James fully describe the evidence and argument upon which he relies. James has not presented any evidence or put forward any arguments that were not reasonably available to him during the Board hearing of March 7, 1984.

For these reasons, the Respondents respectfully request that the Application for Reconsideration be denied without a hearing.

All of which is respectfully submitted.

(3) Text of James' undated letter received by the Board July 24, 1984:

In reply to Koskie and Minsky submission that there is nothing new to the original complaint is of course in error.

I take note that all the precedents put forward by the solicitors are not by any means applicable to my particular case. Further the solicitors mention that all mail be taken for granted as received; however the Board was made aware that the letter was not received.

In the complainant's view the Board has no option but to rule in favour of

the same. As pertaining to the time lapse, the sine die was without prejudice and all other delays are not the fault of the complainant but the Board's.

At my request the Ombudsman is just waiting for a final ruling which if not in my favour it will be activated by him into a look into the whole case.

If in view of the two legal binding documents that are irrefutable I cannot attain from the board a just settlement then the board itself is unable or unwilling to complete its function and should be disbanded. It is the intention of the complainant to take this case to any and all forms available to him including members of parliament, the premier of the province and the press. Surely in a country such as Canada justice will prevail.

5. James bases his request for reconsideration on the following grounds:

- (1) a claim that he did not receive the Board's letter dated February 23rd, 1984 forwarding a request for particulars from the solicitors for Locals 493 and 527.
- (2) The failure of the Board's decision to identify as a cause of delay the Board's failure to serve notice on the respondent Labourers' International Union of North America respecting the hearings held on June 13th, 1983 and January 31, 1984.
- (3) The original complaint did not name Local 493 because James was under the impression at the time the complaint was filed that Local 493 was pursuing a grievance on his behalf.
- (4) The number of men in Local 527 out of work has no bearing on him because he was a steward and was appointed until the completion of the project.

6. It is useful to set out the sequence of events from the filing of the first complaint through to James' request for reconsideration before dealing with the request itself.

7. The instant complaint was filed May 10th, 1983. It names as respondents the persons Nello Scipioni and Bernie Carrozzi and the Labourers' International Union of North America, which will hereinafter be referred to as the International.

8. At the making of the complaint, Scipioni and Carrozzi were officers of Local 527 of the International. Paragraph 4 of the complaint names them as the persons who, on behalf of the respondents or on their own behalf, had dealt with James on or about January 17th, 1983, contrary to section 68 and 69 of the Act by having:

"Refused to employ the complainant contrary to section 69 of the *Labour Relations Act*. Wherein the complainant was employed as a steward for O. J. Pipelines from Jan. 18/82 up to and including November 26/82 in accordance with the pre-job conferance [sic] report of Jan. 19/82 and in accordance with the letter dated of Jan. 20/82, the Respondent has refused to recall me on the work involved in the completion of the project."

9. Hearings into the complaint were held on June 13th, 1983, January 31, 1984 and March 7th, 1984. A hearing had been scheduled for July 19th, 1983 but was adjourned *sine die* at James' request made without prejudice and with the consent of the parties.

10. At the hearing on June 13th, 1983, James was asked by the Board to clarify his complaint. During his explanation he outlined 11 points which he acknowledged could be summarized into two issues. These were:

- (1) His lay-off on November 26th, 1982 from the O. J. Pipeline project was contrary to the provisions of the Labourers pipeline collective agreement because he was a steward and the agreement required that he be kept on the job until all other employees were laid off.
- (2) He was not recalled by O. J. Pipelines to the project in the spring of 1983 when it started up again and Local 527 had refused to refer him to the project when he requested that they do so.

When clarifying his complaint James made no reference to having asked Local 493, or anyone, to file a grievance on his behalf with respect to either the lay-off or the failure of O. J. Pipelines to recall him to the project. The hearing was adjourned on consent of the parties, in part because of the need to have the International served with notice of the complaint. It had not been served with notice of the complaint or notice of the hearing.

11. On or about December 15th, 1983, James asked the Board to bring on for hearing the proceedings which had been adjourned at his request. A hearing was scheduled for January 31st, 1984. The Board did not serve notice of the hearing on the International and it did not attend and was not represented at the hearing. The hearing was adjourned on the consent of the parties until March 7th, 1984. Prior to the adjournment, counsel for Scipioni and Carrozzi requested the Board to amend the complaint by deleting Scipioni and Carrozzi as respondents since sections 68 and 69 of the Act contemplate complaints against trade unions and not against individual persons. On consent of the parties, the complaint was amended by substituting as respondents Locals 493 and 527 of the International for the persons Scipioni and Carrozzi. At the time, James made no request to amend the complaint with respect to the particular facts alleged to constitute the violations of sections 68 and 69.

12. When the complaint came back on for hearing on March 7th, counsel for Locals 493 and 527 moved to have the complaint dismissed without a hearing on two grounds:

- (1) that the complaint fails to disclose a *prima facie* case against either Local 493 or 527; and
- (2) the complaint is so deficient in particulars in respect to both locals, but especially respecting Local 493, that the respondents could not tell what case they would have to meet.

During consideration of the motion, James requested leave to amend the complaint to include the allegation that Local 493 has violated section 68 of the Act by failing to pursue a grievance on his behalf respecting O. J. Pipelines' failure to recall him to work in the spring of 1984. The Board refused to amend the complaint and, for the reasons given orally in the hearing and confirmed in the Board's decision which issued March 16th, 1984 ruled that the complaint

failed *prima facie* to disclose a violation of either section 68 or 69 by the International, Local 493 or Local 527.

13. The Board's jurisdiction to reconsider its own decisions is found in section 106(1) of the Act which sets out the scope of the Board's decision-making powers in these terms:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The principles which guide the Board in the exercise of its reconsideration powers are described in the following terms in its decision in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185:

4. To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Avenue Faculty Association, York University*, 78 CLLC ¶14,132. (Ont. Div. Ct.).

14. The *Detroit River* decision referred to in the quotation from *K-Mart*, *supra*, sets out the rationale behind the Board's perception that there is, as it said in *K-Mart*, *supra*, a need to "... bring some finality to its adjudicated decisions ...":

"... While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a Court, it must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decision. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except for good cause. ... If it were otherwise, the

door would be open in any given case to ceaseless and never-ending hearings each serving as a prelude to the next *ad infinitum* and no one could ever safely rely on any decision as finally settling the rights of the parties.”

The Board’s decision in *Journal Publishing Company of Ottawa Ltd.*, [1977] OLRB Rep. Sept. 549, at paragraph 6 cited two main reasons for the requirement of finality:

... The first reason is to protect the interests of those who have relied upon the Board’s decision. The reliance interest is perhaps most important in those cases where the Board’s decision has the effect of conferring or withdrawing bargaining rights. In such cases, where representation rights are in issue, the need for certainty and finality becomes obvious. A second reason [sic], and perhaps no less important, is to protect the integrity of the Board’s own processes. These processes must be protected from the parties who, under the guise of reconsideration, are merely seeking to repair, or reargue, a lost case.

15. The passage quoted from the Board’s *K-Mart* decision, *supra*, notes that, while reconsideration is usually restricted to allowing a party to adduce evidence or make representations which it did not have a chance to raise previously, “. . . [the] Board may also consider such factors as the motives for the request for reconsideration in light of a party’s conduct, and the resulting prejudice to another party if the case is reopened.” Thus the usual grounds for reconsideration are not the only grounds and in its decision in *John Entwistle Construction Ltd.*, [1979] OLRB Rep. Nov. 1096, the Board observed that it is important not to follow the usual grounds inflexibly:

“... These are general standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decision, but also to allow parties who may be affected by the Board’s decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly.”

• • •

16. Those principles apply equally to the instant case even though James’ complaint was dismissed on a preliminary motion without hearing evidence. The Board’s decisions respecting the exercise of its discretion under section 106(1) of the Act to reconsider its own decisions make it clear that, in the vast majority of cases coming before the Board, the parties are entitled to expect the Board’s disposition of the case to be final insofar as its own processes are concerned. The exceptions, in the words of the Board in its *K-Mart* decision, *supra*, are when:

“... the party requesting the reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case.”;

and, in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

“... when the party wishes to make representations or objections that he had no opportunity to raise previously.”

As those decisions also point out, both elements depend upon the party seeking reconsideration having been diligent. The Board has also observed that its power to reconsider its own decisions was not intended to be exercised so as to permit a party to repair deficiencies in its case. See *Auto Jobbers Warehouse Ltd.*, [1982] OLRB Rep. May 649. That observation is consistent with the second reason cited by the Board in the *Journal Publishing* decision, *supra*, for the requirement of finality in the Board's decisions.

17. James' letter requesting reconsideration raises nothing which he did not have an opportunity to include in his submissions on the motion to dismiss his complaint. For the most part the letter reiterates his submissions on the motion. One exception is his assertion that he did not receive the Registrar's letters of February 23, 1984, forwarding the request for particulars from the solicitors for Locals 493 and 527. James made no claim in the hearing that he had not received the request for particulars in spite of the fact his failure to respond to the request was an explicit ground of the motion to dismiss. The appropriate time for him to have made the claim was during his response to the motion to dismiss his complaint. Had it been raised then, the Board would have had the opportunity to hear and weigh his testimony under oath and the submissions of the parties as to whether, pursuant to section 113(1) of the Act, James should be deemed to have received the Board's letter. The claim loses credibility being made as a ground for requesting reconsideration of a decision rendered orally in a hearing in which James participated fully.

18. His claim that Local 493 was not named in the original complaint because he understood it was processing a grievance on his behalf is largely irrelevant. His initial complaint was filed May 10, 1983. It should have been obvious to him then, if he had not received any response from the Local about the grievance, that its failure to pursue it should be made part of the complaint. If it was not obvious then, it should have become obvious over time. There was nothing to prevent him requesting leave to amend the complaint at any time prior to the March 7th, 1984, hearing.

19. It is not uncommon for complaints under section 68 and 69 of the Act to be filed without legal assistance and for the complainants to appear before the Board without legal counsel. For that reason it is often necessary for the Board to accept a measure of vagueness in complaints alleging violation of those sections. A fair reading of the Board's decisions dealing with such complaints show that it has not been unduly technical with them in that respect. See for example *Caravelle Foods*, [1983] OLRB Rep. June 875 and the decisions referred to therein. The problem with James' complaint was not simply that it was deficient in particularity, it did not identify in any way the alleged failure of Local 493 to pursue a grievance for him, the very omission which he claims was at the heart of his complaint that Local 493 had failed in its section 68 duty of fair representation. It was not until the motion to dismiss his complaint was made that he sought to amend it to include that allegation, a request made approximately 10 months after the complaint was filed. As the Board observed in its oral ruling on March 7th, James is an experienced steward. The Board is not being unduly technical to expect that he would have made direct, clear reference in his complaint to Local 493's alleged failure. As it was, he did not link the Local to his original complaint in any manner, not even by naming an officer or other agent of the Local as a respondent. While it was procedurally incorrect, he saw fit to name officers of Local 527.

20. Now, having failed to satisfy the Board on March 7th, 1984 why his complaint as filed on May 10, 1983, made no reference to Local 493's alleged failure to pursue James' grievance, he is seeking by means of the request for reconsideration to re-argue his request to amend the complaint to add that allegation. He had the opportunity to make full submissions at the time of the motion. His letter requesting reconsideration contains nothing which, on March 7th, he could not have argued in support of his request to amend the complaint or defend the motion to dismiss. In brief, the usual grounds set out in the authorities referred to above for granting reconsideration are not present. Nor does his letter identify any special factors which would persuade the Board to re-open his complaint.

21. In these circumstances, the Board declines to reconsider and vary or revoke its decision which issued March 7th, 1984.

2327-84-R United Food and Commercial Workers International Union Local 1105P, Applicant, v. **Maple Lynn Foods Limited**, Respondent, v. Group of Employees, Objectors

Bargaining Unit — Practice and Procedure Parties reaching agreement on unit description — Union seeking alteration to unit after disclosure of employee schedules but before count announced — Alteration permitted

BEFORE: S. A. Tacon, Vice-Chairman, and Board Members A. Grant and P. Grasso.

APPEARANCES: *Douglas John Wray and Mattie McKay for the applicant; Brian O'Byrne for the respondent; C. J. Abbass, Dale Buckley and Murry Robertson for the objectors.*

DECISION OF THE BOARD; December 21, 1984

1. The name of the respondent is amended to read: "Maple Lynn Foods Limited".
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The parties met with a Board Officer and reached initial agreement on the bargaining unit description. However, after disclosure of the schedules but before the membership count was announced, the applicant sought to modify the bargaining unit description so as to exclude part-time employees in addition to the already agreed-upon exclusion of students employed during the school vacation period. It also became apparent that the first line of managerial exclusion, namely, foremen/forewomen referred to a non-existent category of individuals, in the respondent's view. On this aspect, the applicant asserted that several persons on Schedule A should be excluded as foremen/forewomen. It is Board practice not to refer to non-existent categories in describing bargaining units.

5. Counsel for the respondent and counsel for the employee objectors submitted that the Board should not permit the applicant to have the admittedly usual exclusion of part-time employees because the applicant had already viewed the schedules. It was submitted that disclosure of the schedules would enable the applicant to calculate its membership position and, thus, rendered the announcement of the "count" by the Board Officer a meaningless formality. To permit such a modification would permit the applicant to "play the members game," i.e., to abuse the Board's processes. Counsel for the respondent referred to *Intercity Food Services Inc.*, [1976] OLRB Rep. July 388, particularly para. 3, in support.

6. Counsel for the applicant asserted that the applicant first learned of the existence of part-time employees when the schedules were disclosed and promptly requested the modification. The exclusion of part-time employees was usual and should be permitted here. The "agreed-upon" unit excluded students employed during the school vacation period. This classification was normally grouped with part-time employees but would be left separate and alone if the part-time employees were not also excluded. Moreover, the applicant could calculate its position as soon as the respondent filed its reply just as readily as when the schedules were disclosed and, thus, the "bright line" should remain as the revealing of the actual count.

7. It should be noted that counsel for the respondent and counsel for the employee objectors disputed the assertion that the applicant was not previously aware of the existence of part-time employees. In addition, counsel for the applicant commented on the fact that the respondent had filed three replies each identically dated but indicating different numbers of employees; the last such reply was disclosed to the applicant on the morning of the hearing. The respondent submitted this was irrelevant to the Board's determination.

8. For convenience, the following passage from *Intercity Foods*, *supra*, is set out:

2. The Board's practice in according an applicant trade union a part time bargaining unit where an all employee unit is requested is to accede to any such request upon the employer's request for their exclusion. At the initial hearing in this matter no such request was made by the applicant trade union. Rather the request was made as a result of information derived from the efforts of the Labour Relations Officer to resolve a managerial question for purposes of the appropriate exclusions from the full time bargaining unit. The Board, in a recent decision, indicated its concern in making such requests in like circumstances after the bargaining unit is settled and the membership count is disclosed. (See; *The Corporation of The Township of Kingston* case [1975] OLRB Rep. April 370 at p. 371):

"It has been the practice of the Board to not entertain requests for alteration in a bargaining unit after disclosure of the number of persons on the schedules and the membership position of the applicant. In this particular application, the representative of the applicant made no representation for exclusion of part time personnel until after the disclosures referred to above had been made at the hearing. Under these circumstances, the Board was unable to comply with the request of the applicant for exclusion of the part-time personnel from the bargaining unit. The procedure adopted by the Board was not at variance with the well established practice of the Board."

3. For like reasons, the Board must deny the applicant's untimely request for a certificate granting bargaining rights for the respondent's part time employees. The appropriate time for making such requests is at the stage of the proceedings when the bargaining unit is being discussed and not thereafter when the lists of employees are in the process of being settled.

9. The Board made the following oral ruling:

"The Board has considered the submissions of the parties and has reviewed the *Intercity Food* case cited by the respondent. The Board is not persuaded that the Board's practice, as enunciated in *The Corporation of the Township of Kingston*, [1975] OLRB Rep. Apr. 370 (at p. 371) should be departed from. That is, the Board will not entertain requests for alteration of an agreed bargaining unit description after disclosure of the number of persons on the schedules *and* the membership position of the applicant. It is not disputed that in this case the membership count was not disclosed. Accordingly, the Board finds the following bargaining unit to be appropriate:

all employees of the respondent at its Bon-EE-Best Eggs Division in Mississauga, save and except plant manager, persons above the rank of plant manager, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

10. The Board hereby affirms that ruling and would add the following comments. Firstly, there may well be exceptional cases where the Board would depart from the above-stated policy. There is no doubt, however, that this is not one such case. The respondent filed three inconsistent replies, the last of which was filed on the morning of the hearing, thereby giving the applicant no opportunity to investigate. Moreover, the existence of employees who, under the Board's definition, would be classified as "part-time" is not readily discernable during an organizing campaign. Secondly, the Board is not naive about what was referred to as "the numbers game", an exercise not rarely indulged in by both respondents and applicants where one or both parties perceive a tactical advantage in so doing. Given that reality, the Board is of the view that a "bright line" test is most appropriate.

11. The applicant seeks the exclusion as "foremen/forewomen," of A. M. Mortenson, Robert Reynolds and David Stefan, classified by the respondent as two lead hands and senior shipper, respectively. The applicant also seeks the exclusion of Jean Brown, classified as plant production clerk, as "office staff." The respondent seeks the inclusion of these individuals. A Board Officer is hereby authorized to enquire into and report back to the Board on these matters.

12. The Board has determined, however, that the applicant's right to certification would not be affected by the Board's ultimate decision as to the exclusion from or inclusion in the bargaining unit of these four individuals. The Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on December 3, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. Three statements of desire were filed with the Board, containing in total twenty-six names, one of which coincides with the names of those who previously signed membership cards with the applicant. The Board finds the statement of desire is not relevant because even if it is voluntary it would not raise doubt concerning the continued support for certification of the applicant, by a sufficient number of employees who also signed membership cards, that the Board would exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken despite the fact that more than 55% of the employees in the bargaining unit were members of the applicant at the relevant time.

14. Accordingly, the Board pursuant to its discretion under section 6(2) of the Act and pending the final resolution of the composition of the bargaining unit, certifies the applicant as bargaining agent for all employees of the respondent at its Bon-EE-Best Eggs Division in Mississauga, save and except plant manager, persons above the rank of plant manager, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, and, pending the final determination of the matter in dispute, excluding as well the individuals named in paragraph 11.

15. A formal certificate must await the final determination of the bargaining unit.

1180-84-R The Canadian Union of Public Employees and its Local 504 (Peterborough Civic Employees Union), Applicant, v. **The Corporation of the City of Peterborough**, Respondent, v. Amalgamated Transit Union, Division 1320, Intervener

Sale of a Business — Request under s. 63(6) on the basis of intermingling made 5 1/2 years after sale — Board setting out factors considered in exercising discretion — Finding jurisdictional dispute proceeding more appropriate in circumstances

BEFORE: R. A. Furness, Vice-Chairman, and Board Members L. Collins and A. Grant.

APPEARANCES: *S. R. Hennessy, Doug W. Packman and Mike Ray for the applicant; Richard Taylor and Murray Hynes for the respondent; H. M. Pollit, R. Renaud, Neil McMahon, Angus MacFarlane and Gerald Longhurst for the intervener.*

DECISION OF THE BOARD; December 10, 1984

1. The applicant has applied to the Board under section 63 of the *Labour Relations Act* with respect to the bargaining rights of the intervener as a result of a sale of a business by Border Transit Ltd. ("Border") to the respondent which took place on or about December 30, 1978.

2. The applicant has requested (a) a declaration that since the disposition of the original hearings of this matter by the Board there has now been sufficient intermingling of employees to bring section 63(6) into operation, (b) a declaration that the applicant is the bargaining agent for all mechanics, bodymen, greasers, cleaners, workers and servicemen employed in the public transit service and presently represented by the intervener and (c) an amendment to

the certificate of the intervener to exclude "employees who are mechanics, bodymen, greasers, cleaners, workers and servicemen employed in the public transit service and represented by the intervener and the amendment of Canadian Union of Public Employees and its Local 504's certificate to include these employees.

3. In its reply the respondent adopted the position that the applicant was not entitled to the relief claimed without a vote being ordered pursuant to section 63. The intervener opposed this application and argued that the Board did not have jurisdiction to entertain this application. It was the view of the intervener that the application could be made under section 63 only as long as the parties were operating under a collective agreement with the predecessor employer.

4. In order to understand the facts of the instant application, it is necessary to outline the events and applications before this Board which have preceded the instant application. Before December 30, 1978, the public transit system in the City of Peterborough was operated on a franchise basis by a privately owned company by the name of Border Transit Ltd. ("Border"). The respondent, for reasons which are not here material, decided and enacted that it would operate the public transit system from and after December 30, 1978, and that for that purpose it would purchase the facilities and equipment of Border. After considering the evidence and representations before it, the Board concluded that there had been a transfer or disposition amounting to the sale of a business within the meaning of section 55 [now section 63]. See *City of Peterborough*, [1979] OLRB Rep. Feb. 133. At the time of the transfer or disposition, the applicant held the bargaining rights for all service and maintenance employees as well as all office and clerical employees of the respondent through collective agreements with the applicant and its sister Local 126, respectively. The office employees of Border who were not represented for collective bargaining purposes prior to the transfer or disposition of the business became an accretion to the bargaining unit of office personnel employed by the respondent. The applicant represented among others all drivers, mechanics and cleaners employed by the respondent and asserted a similar claim with respect to the drivers, mechanics and cleaners formerly employed by Border who were represented in collective bargaining by the intervener. The intervener claimed to continue to represent these former employees of Border by the operation of section 55(2) and (3) [now section 63(2) and (3)] of the Act.

5. The Board determined in *City of Peterborough, supra*, that at the time of the hearing the two groups of employees concerned in that case had not been merged to any extent and that the employees continued to work at separate jobs with separate equipment at separate locations just as they had prior to the transfer of the business. The Board stated that there had not been any intermingling of employees that would trigger the operation of section 55(6) [now section 63(6)] of the Act. At pages 136 and 137 the Board stated:

14. A particular concern in the determination of bargaining units under section 55 of The Labour Relations Act is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what the Labour Relations Act is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time.

15. In this case the evidence establishes that the drivers, mechanics and cleaners employed in the transportation service work in locations separate from the other employees of the City. They have a history of working together and bargaining together through the applicant. They share a separate community of interest from other City employees having regard both to the nature and the location of their work and to the cadre of immediate supervisors under whom they function. The employees in question are presently constituted as a sound and viable bargaining unit and there is no reason to believe that the continuation of the bargaining rights that they enjoy will unduly hamper the employer's operations. In these circumstances the Board sees no useful labour relations purpose to be served by destroying that bargaining unit in whole or in part. The Board therefore finds that the bargaining rights of the applicant should be preserved and that the scope of the bargaining unit of transit employees should continue as it was constituted under Border Transit Limited.

That decision was released on February 13, 1979.

6. In *The Corporation of the City of Peterborough* (Board File No. 0531-80-R, decision dated September 5, 1980), the applicant made an application under section 55(6) of the Act [now section 63(6)]. The applicant argued that since the earlier disposition there had been an intermingling of employees such as to bring into play section 55(6) [now section 63(6)]. The applicant argued that there had been an intermingling of employees since the previous decision. The intervener argued that this was a matter which had been raised before the previous panel of the Board and should therefore be dismissed. The Board reserved its decision on whether an application under section 55(6) [now section 63(6)] was appropriate until it heard the evidence and the representations of the parties on the extent of the intermingling. The parties submitted the following agreed statement of fact:

There are seven people in the intervener's bargaining unit which have been currently intermingled with employees represented by the applicant. There are three washers from the ATU which wash buses in a location other than the main work area. In addition, three or more labourers from CUPE also wash buses and other equipment. One CUPE member has been retrained to relieve the three ATU washers which work on a five-day schedule at the bus barn, if an ATU man is absent. The week-end shift is apparently all CUPE members who wash buses or any other vehicle, this shift consists of four employees. There is one greaser from the ATU and one greaser from CUPE, they both work at the same location and work on any and all vehicles. There are five CUPE mechanics and three ATU mechanics, these apparently work at the same location and they work on all vehicles. There are forty-three full-time drivers at the transit local, and six part-time drivers driving the buses. There are one hundred and fifty drivers represented by the CUPE local who drive trucks and cars. Apparently, there are about six CUPE drivers which transport buses but they are not regular bus drivers. The bus storage barn is used from Monday to Friday, but only for the purposes of washing vehicles. The public vehicle garage is where all the servicing is done and the week-end washing. The intermingling, apparently, involved a move of the servicing to the public vehicle garage, that occurred sometime in April or May of 1979. The greasing operations were also moved

at that time. Apparently, the bus operators work open schedules set for a three-month period. Further, the ATU mechanics tend to work a mid-night shift. Apparently, there are two mechanics on the night shift from the ATU, whereas, no CUPE members work the night shift since this is not provided for in the CUPE collective agreement. On the other hand, the ATU agreement provides for no washers on the week-end.

7. The Board held that on the basis of the agreed statement it was difficult to see that there had been any great degree of intermingling of the employees involved. The Board concluded that there had not been sufficient intermingling to bring into play section 55(6) [now section 63(6)]. The application was dismissed.

8. The instant application was filed on August 3, 1984, some five and a half years after the transfer or disposition has occurred. Are the provisions of section 63(6) to be applied in the circumstances of this application?

9. Section 63(6) states:

Notwithstanding subsections (2) and (3), where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board *may*, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by *the collective agreement referred to in subsection (2)*;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in *any collective agreement*.

[emphasis added]

Section 63(2) and (3) states:

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by *the collective agreement* as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise

declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a *collective agreement* or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

[emphasis added]

The Board does not have a general power to alter certificates or collective agreements. It has, however, specific powers to alter certificates or collective agreements under section 63(6) in connection with a sale of a business and under section 91(15), (16) and (18) arising from a jurisdictional dispute.

10. In our opinion, an order under section 63(6) should be limited to circumstances where the exercise of management rights pursuant to a sale results in an intermingling so thorough or so sudden that it is impractical to resolve the resulting representational problems by means of collective bargaining. If the impracticality of collective bargaining to resolve representational problems arising out of a sale is the main criterion for an order under section 63(6), an applicant must show that there has been a significant degree of intermingling which has given rise to representational problems and that the intermingling is closely related in time to the fact of the sale. The more time that passes between a sale and an intermingling, the more difficult it is for any party to claim that the accommodation of competing interests could not have been implemented on a negotiated basis. Where a trade union is making an application under section 63(6), the more time which passes before an intermingling, the more does an application under that section resemble an attempt to sweep in or an application for displacement. The intervener's bargaining rights should not be subjected indefinitely to the danger of an application under section 63(6). Beyond a certain point in time, an incumbent union is entitled to expect that its bargaining rights may be altered only by termination or displacement, a jurisdictional dispute or the process of collective bargaining itself.

11. The Board has considered the question of the lapse of time between the sale of a business and the making of an application which invokes the provisions of section 63(6). In *Lake of the Woods District Hospital*, [1968] OLRB Rep. July 399, two hospitals were amalgamated by a private act of the Legislature and their operations were taken over by a successor corporation created for that purpose. The applicant sought and received a declaration of successor rights as "sale of a business" had occurred. The Board refused to grant an application under section 47a(5) [now section 63(6)] because there had been no intermingling with employees of the two predecessor hospitals. The Board observed that an application under section 47a(5) [now section 63(6)] might be available at a future date. At page 401 the Board stated:

11. It was pointed out to the parties at the hearing of this application that subsection 5 of section 47a was not limited in its application to a situation immediately following a sale of a business. In other words, that subsection contemplates that an intermingling may take place some time after such a sale in which case an application could be made to the Board . . .

There will be cases where an intermingling does not follow immediately upon a sale, yet an order under section 63(6) remains appropriate for dealing with the resulting representational problems. For example, in *Avondale Dairy Limited*, [1971] OLRB Rep. Dec. 781, the applicant Dairy purchased a competitor's depot and continued to employ its employees. Some three months after the sale, the applicant closed down one of its nearby depots and transferred the employees there to the newly purchased facility. The Board granted the application under section 55(6) [now section 63(6)] and ordered a representation vote at the new facility. The Board stated at page 783:

Although there has been a three month delay in implementing the transfer of operations to Crystal Beach following its purchase, we are satisfied, having regard to the evidence. . .that such action was prompted by *bona fide* economic considerations.

12. *Avondale Dairy Limited* indicates that a successor employer can make an application under section 63(6) where it has delayed for *bona fide* economic reasons an intermingling that is nevertheless a direct and intended consequence of the sale. It appeared that the intermingling, once undertaken, was swift and complete and that collective bargaining was not a suitable way in dealing with the situation even though negotiations for a new collective agreement at the plant were underway at the time. In *The Bryant Press Limited* case, [1972] OLRB Rep. April 301, the applicant employer purchased a competitor's printing business. One month after the sale, the intermingling of employees commenced and the greater portion of the intermingling occurred between six to eight months after the sale. The successor employer applied for a declaration under section 55(6) [now section 63(6)] approximately eleven months after the sale. The application was granted and the Board stated at page 304:

. . .we see no reason to decline to make a declaration under the subsection because Bryant waited until ten months after the intermingling commenced to make its application. In this regard we would point out that the intermingling largely took place in the fall of 1971 and was only completed by November 1st in that year. Moreover, the respondent cannot claim that its position has been prejudiced as it was aware of the intermingling from the time that it began and could have brought an application at any time after, or for that matter before, the intermingling commenced, for a declaration as to the bargaining rights which it had acquired as a result of the sale under its collective agreement.

13. The Board notes that *The Bryant Press Limited* case represents the longest period of time after a sale (eleven months) that the Board has entertained an application under section 63(6) or its predecessors. However, *The Bryant Press Limited* case is not precisely on point with the present application because the beginning of the intermingling process was separated from the sale by only one month. The intermingling process itself consumed some time, but there seems to have been no argument that the intermingling was not a direct and intended result of the sale. The trade union's argument in *The Bryant Press Limited* case was really

similar to an argument of *latches*, and the Board treated it as such by focusing on whether there had been any prejudice to the trade union. In *Silverwood Dairies, Division of Silverwood Industries Limited*, [1980] OLRB Rep. Oct. 1526, the Board granted an application under section 55(6) [now section 63(6)] and ordered a representation vote where the intermingling of employees had occurred four months after the sale. The Board followed the decisions in *Avondale Dairy Limited* and *The Bryant Press Limited* cases, and entertained the application. The longest period after a sale that a successful application has been made is eleven months, and the longest period between a sale and the intermingling that gave rise to a successful application has been either four months as in *Silverwood Dairies, Division of Silverwood Industries Limited*, or six months (the time at which a significant degree of intermingling took place in *The Bryant Press Limited* case). The Board was not referred to any authorities where an application under section 63(6) had been granted where a significant intermingling occurred some five and a half years after the sale.

14. The Board does not intend to set specific limits on the lapse of time in applications which are made under section 63(6). The time limit should be allowed to vary with the circumstances of the case. Factors which may be considered in assessing the appropriateness of granting relief under section 63(6) may include; a) whether the intermingling was a direct and intended consequence of the sale; b) whether the intermingling was so significant as to raise representational problems not likely to be resolved by collective bargaining; c) whether the intermingling process occurred before the collective bargaining process could be invoked to deal with the matter; and d) whether the circumstances raised the suspicion that the application is a disguise for an application for displacement or a sweep-in. The respondent has concluded at least one collective agreement with the applicant and the intervener since the "sale" to it by Border. Section 63(6) is a remedial section designed to deal with representational problems incapable of resolution by collective bargaining and the fact that collective bargaining has taken place between the sale and the application and collective agreements have been entered into indicates that the problems that section 63(6) is designed to deal with have been addressed or have not arisen in the context of a "sale". In our view, contentious issues should be resolved where possible through collective bargaining. Section 63(6)(a) enables the Board to declare "that the person to whom the business was sold is no longer bound by *the collective agreement* referred to in section 63(2) [i.e. *the collective agreement* between a vendor and a trade union in force at the time of the sale]". In *Canadian General Electric Company Limited*, [1978] OLRB Rep. June 501, the Board made the following observation where a declaration was sought under section 55(6) [now section 63(6)] after a collective agreement was concluded between the successor employer and the trade union that had dealt with its predecessor at page 506:

Even if the Board were able to draw a conclusion that there was a sufficient degree of intermingling for it to exercise its discretion under subsection (6), it is quite clear that a declaration under paragraph (a) would be inappropriate since the agreements contemplated by subsection (2) have now been replaced by the agreements entered into by the applicant. Given the inapplicability of paragraph (a), the Board has serious doubts as to whether any of the other provisions of subsection (6) are applicable to this situation.

15. If the observation in *Canadian General Electric Company Limited* is followed, all of section 63(6) becomes inoperative once a collective agreement is signed between the successor employer and the predecessor employer's trade union. A problem, however, is raised by the wording of section 63(6)(d), which allows the Board to "amend, to such extent as the Board

considers necessary, *any* collective agreement". Do the words "any collective agreement" contemplate an amendment under section 63(6) being made to a collective agreement concluded *after* the sale? In our view, the words "any collective agreement" permit the Board to redefine the *existing* collective agreement of all or any trade unions drawn into a representational conflict by the sale of a business. This is by contrast to section 63(6)(a), which allows the Board to declare unenforceable an entire collective agreement only where the collective agreement in question is the particular one binding the predecessor employer. As the *Canadian General Electric Company Limited* case reasons, from time to time such a collective agreement is entered into, any representational problems arise from the various collective agreements rather than from the fact of the sale. Section 63(6) does not contemplate the exercise of interpreting the scope clause of one or more collective agreements; such task is properly left to grievance arbitration or to a jurisdictional dispute proceeding.

16. In the present case, the representational problem brought before the Board appear to be derived entirely from the collective agreements. The question comes down to an interpretation of one or both collective agreements. If the present collective agreements conflict or contain ambiguities, the problem must be settled by grievance arbitration or a jurisdictional dispute proceeding. It is unreasonable to trace any problem back to the "sale" after a lapse of five and a half years. The applicant has argued that the Board should make a declaration under section 63(6) because, among other reasons, jurisdictional dispute proceedings are not appropriate to cure a "representational problem" where there is no conflict between bargaining units on the face of the collective agreements which are involved. The jurisdictional dispute procedure is an appropriate way of dealing with the matter. Contrary to the position of the applicant, the case of *Camco Inc.*, [1982] OLRB Rep. July 987, does not bar a jurisdictional dispute proceeding to deal with a "representational problem". *Camco Inc.* states at page 992 that section 91(18) is a charging section giving the Board power to alter bargaining unit descriptions in a collective agreement independent of the requirement of a work assignment set out in section 91(1). The Board also stated that section 91(18) is "designed primarily to promote [a] forum for the settlement of representational disputes arising out of collective bargaining unit descriptions in the 'industrial type' collective agreement". This is not the situation here. As for the objection that there is no conflict here between the applicant's and the intervener's collective agreements on their faces, nothing in section 91(18) limits the Board's jurisdiction to cases where collective agreements conflict on their face.

17. Having regard to the foregoing considerations, the Board finds no reason to exercise its discretion under the provisions of section 63(6) of the Act. This application is dismissed.

1259-84-R Local #1 Ontario — International Union of Bricklayers' & Allied Craftsmen, Applicant, v. **Quorum Inc.**, Respondent

Employee — Employer — Certification — Construction industry — Respondent operating squash club — Agreement with federal government providing subsidy for wages of unemployed persons hired under work program — Respondent hiring bricklayers under program to renovate and extend club — Whether employer in construction industry — Whether respondent, federal government or company managing project real employer

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members W. G. Donnelly and H. Kobryn.

APPEARANCES: *William Gower for the applicant; John Ross and Ernie Geisel for the respondent.*

DECISION OF THE BOARD; December 13, 1984

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

2. By way of this application, the applicant trade union is seeking to be certified as the bargaining agent for a unit of bricklayers and stonemasons employed by the respondent, Quorum Inc. Quorum Inc., however, contends that this is not a proper application. It submits that it is not an employer in the construction industry and, more specifically, not the employer of the individuals the applicant seeks to represent.

3. Quorum Inc. owns and operates the Hamilton Squash Club. At the time of the filing of the application the club was being extended and renovated. Part of the money to finance the work came from the Canada Employment and Immigration Commission under a program known as "Canada Works". Under this program, individuals receiving benefits under the Unemployment Insurance Act, are offered work with a "sponsor" on an approved project. The individuals in question continue to receive benefits under the Unemployment Insurance Act, as well as additional payments from the sponsor. The Government may also provide the sponsor with additional funds to finance the project. On April 4, 1984, the Canada Employment and Immigration Commission and Quorum Inc. entered into an agreement with respect to the "CanadaWorks" program in which the Commission was referred to as "CANADA" and Quorum Inc. as the "EMPLOYER". The agreement is a lengthy one, but the following provisions are of particular note.

3. The project and all persons employed thereon shall be at all times under the direct supervision, management and control of the EMPLOYER or of an agent of the EMPLOYER who has been approved by CANADA.

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7. All payments required by law to be made by an employer including Income Tax, Canada Pension, Quebec Pension and holiday pay shall be the sole and absolute responsibility of the EMPLOYER and, unless

waived by CANADA, the EMPLOYER shall establish prior to receipt of any contribution that all registration requirements pertaining to such payments have been completed.

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9. The EMPLOYER shall be solely and absolutely responsible for any liability arising from a contract between the EMPLOYER and any sub-contractor engaged to undertake a portion of the project.
10. No amount due to a sub-contractor will be considered as a valid and proper claim in respect of wages but rather shall be deemed to be included in other costs of the project.

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12. Unless otherwise authorized by CANADA the services and facilities of the Canada Employment Centre shall be used for enlisting project participants, it being understood that
 - A) only those persons who qualify to receive unemployment insurance may be enlisted, and
 - B) all project participants will be required to sign an undertaking with respect to his/her participation in the project prior to accepting employment therewith.

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14. In cases where CANADA determines that a demand has arisen in the occupation of a person employed on the project in the area in which the project is carried out CANADA may require such person to undertake an active job search and the EMPLOYER agrees to permit such person, during normal working hours, to attend interviews considered necessary for such active job search.
15. The EMPLOYER will countersign the bi-weekly report card to be submitted to CANADA by each unemployment insurance claimant employed on the project.
16. The EMPLOYER shall indicate on the bi-weekly report card those authorized absences for illness, injury, or job search.
17. The EMPLOYER shall set up and maintain such books and records as are necessary for the proper financial management of the project, including (a) a record of the names, addresses and duties of each employee, their wage rate, the amount of wages actually paid and the hours worked daily by each, (b) a record of all expenditures together with supporting documentation such as vouchers, receipts and cancelled cheques.

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32. The EMPLOYER shall be solely responsible for and shall hold CANADA free from any and all losses, expenses, damages, demands and claims arising out of or in connection with injuries (including death) or damages to any and all persons whether participants or others and to property in any way sustained or alleged to have been sustained in connection with or by reason of the performance of the project.

4. Schedule "A" to the above quoted agreement contains a projected cost breakdown which provides, in part, as follows:

CALCULATION OF PROGRAM CONTRIBUTION

	<u>Total Estimated Cost</u>	<u>Funds From Other Sources Including S.38 Appl.</u>	<u>U.I. Funds</u>	<u>Program Contribution</u>
Expense Items				
Project Management Wages	20,000	8,000	12,000	
Other Employees Wages	572,200	308,200	264,000	
Other Costs	585,000	470,000		115,000
Additional Costs	NIL	NIL		NIL
Workers Compensation (if applicable)	18,792	10,336		8,456
Third Party Liability Insurance	0	0		0
Gross Project Cost	1,195,992	796,536	276,000	+123,456
		Total funds from other sources	Total U.I. funds	Total other funds
		Total Program Contributions		399,456

It appears from this schedule that of the projected total amount of "wages" to be paid to people working on the project, Quorum Inc. would provide \$308,200 while \$264,000 would come from Unemployment Insurance funds. The schedule further indicates that of the \$1,195,992 projected total cost of the project, Quorum Inc. would contribute \$796,536 while the total Federal Government contribution, from both unemployment insurance and other funds, would be \$399,456.

5. Five bricklayers, one of whom served as a brick layer foreman, worked on the Hamilton Squash Club project. All were members of the applicant trade union. The applicant contends that the bricklayers were employees of Quorum Inc., and on this basis it seeks to be certified to represent employees of the company. As already indicated, Quorum contends it was not an employer in the construction industry and, in particular, not the employer of the bricklayers. The Company submits that the bricklayers may not have been employees at all, but unemployed persons, and that if they were employees, they were employees of either the Federal Government or of a construction firm known as Beatty-Hall.

6. The evidence indicates that Quorum Inc. retained the services of Beatty-Hall to manage the Hamilton Squash Club project. The actual contract between Quorum Inc. and Beatty-Hall was not put in evidence. It appears that at the relevant time Beatty-Hall directly employed a general foreman on the squash club job site; although the bricklayer foreman worked under the terms of the "Canada Works" program. According to Mr. William Gower, an official of the applicant trade union, prior to the commencement of work on the Hamilton Squash Club project he was approached by the Unemployment Insurance Commission with a request that the union supply bricklayers to the project at 75 per cent of their regular wage rate. When Mr. Gower refused this request, the Commission agreed that the men would receive 100 per cent of their regular wage rate. Mr. Gower stated that the Commission asked that the union refer the bricklayers (including the bricklayer foreman) to Beatty-Hall, but on behalf of the union he refused. On June 15, 1984, Quorum Inc. sent the following letter to the union in which it indicated it would be the employer of the bricklayers:

Re: The Hamilton Squash Club 1984 Expansion

The undersigned owner/builder of the above project hereby confirms and agrees to respect all terms of the collective agreement between your union and the Masonry Industry Employers Council of Ontario and with regard to *any members of your Union while directly employed by us* on the above captioned project.

And the undersigned further agrees to make all deductions and pay all fees and dues to the union relative to such employees in accordance with the terms of the collective agreement.

(emphasis added)

The evidence indicates that the bricklayers were paid by Quorum on company cheques.

7. Given the evidence before us, we are satisfied that the five bricklayers were "employees" and not unemployed persons while working on the squash club project. They performed meaningful work for which they received monetary remuneration. Not only was this remuneration greater than the amount they would have received as unemployment insurance benefits

had they not been working, but they were paid the same wage rate that they generally receive. We are also satisfied that the Federal Government was not the employer of the bricklayers. While much of the money used to pay the bricklayers did come from the Government, the Government did not have control over the tradesmen, did not actually pay them, and the work they performed was primarily for the benefit of Quorum Inc. It is also noteworthy that the contract between the Government and Quorum Inc. was predicated on the understanding that Quorum Inc., and not the Government, would be the employer of employees working on the project.

8. A more difficult issue is whether Quorum Inc. or Beatty-Hall should be regarded as having been the actual employer of the bricklayers. It seems reasonable to assume that officials of Beatty-Hall made the day-to-day decisions relating to the overall running of the job site. Nevertheless, the five bricklayers were actually paid by Quorum Inc., albeit some of the money had been given to Quorum by the Government. Under the terms of the agreement between Quorum Inc. and the Government, Quorum was to be the employer. The applicant expressly declined to refer the bricklayers to Beatty-Hall. For its part, Quorum sent a letter to the union whereby it indicated that it would be the direct employer of the bricklayers. Taking all these considerations into account, we are led to conclude that the bricklayers were more likely in the employ of Quorum Inc. than of Beatty-Hall. In that Quorum Inc. was employing employees in the construction industry, we are further satisfied that at the time it was, in fact, an employer in the construction industry. See: *The Municipality of Metropolitan Toronto* [1980] OLRB Rep. Jan. 62; and *The Kinsmen Club of Leamington* [1983] OLRB Rep. Nov. 1850.

9. In its filings Quorum Inc. raised two other objections to the application. One was that applicant, when agreeing to supply members of the union to the job site, had agreed not to apply to be certified. No evidence was led in support of this contention. Neither was any evidence led with respect to the other objection, namely the claim that the applicant had used improper methods to obtain its membership evidence. In these circumstances, neither objection can be given any weight.

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[Balance of decision making routine findings and issuing certificate omitted]

2375-84-R The Canadian Union of Public Employees, Applicant, v. **Scarborough General Hospital**, Respondent, v. International Union of Operating Engineers, Local 796, Intervener

Bargaining Unit — Practice and Procedure — Representation Vote — Parties in pre-hearing displacement application agreeing to language different than in description of incumbent's unit — Accepted where result only to clarify and not alter actual composition — Alteration likely to cause confusion rejected

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members W. G. Donnelly and W. F. Rutherford.

DECISION OF THE BOARD; December 12, 1984

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote be taken.

2. The unit applied for by the applicant was described in its application as follows:

All employees of the respondent in Metropolitan Toronto, employed as Stationary Engineers, save and except Assistant Chief Engineer and persons above the rank of Assistant Chief Engineer.

The unit proposed by the respondent in its reply was as follows:

All Stationary Engineers employed by the respondent in the power-house, save and except Assistant Director, Maintenance and Engineering, those above the rank of Assistant Director, Maintenance and Engineering and persons covered by subsisting collective agreements.

The respondent and intervener are parties to a collective agreement which, by its terms, applies to:

All Stationary Engineers in the employment of the Employer, save and except Assistant Chief Engineer and persons above the rank of Assistant Chief Engineer.

3. In accordance with its usual practice, the Board by order dated November 29, 1984, appointed a Labour Relations Officer to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 9 of the *Labour Relations Act*, and to confer with the parties as to the description and composition of an appropriate bargaining unit, the description and composition of the voting constituency, the list of employees as of the terminal date, to be used for the purposes of any vote that might be directed by the Board, and with respect to arrangements for the conduct of any such vote. The officer so appointed met with the parties December 10, 1984, at which time they all agreed that the appropriate bargaining unit and voting constituency in this application should be described as follows:

All employees of the respondent in Metropolitan Toronto, employed as

Stationary Engineers, save and except Assistant Director of Maintenance and Engineering, persons above the rank of Assistant Director of Maintenance and Engineering and persons covered by subsisting collective agreements.

4. The bargaining unit and voting constituency description agreed to by the parties differs from the unit description in the existing collective agreement in four particulars: (a) "Stationary Engineers" is changed to "Employees employed as Stationary Engineers"; (b) the implicit province-wide scope of the existing unit is narrowed to Metropolitan Toronto; (c) the job title applied to the first — line managerial exclusion is changed from "Assistant Chief Engineer" to "Assistant Director of Maintenance and Engineering"; and, (d) the exclusions are expanded to cover "persons covered by subsisting collective agreements".

5. Where there is a request for a pre-hearing representation vote on a displacement application, the Board's standard practice is to require the applicant to accept as a voting constituency the bargaining unit represented by the incumbent union; see *Toronto East General and Orthopaedic Hospital, Inc.*, [1981] OLRB Rep. Feb. 225 at paragraph 9. This is because the Board's general practice in displacement applications is to view the established bargaining structure as *prima facie* appropriate. Although the appropriate bargaining unit is not determined by the Board until after a pre-hearing vote has been conducted, the likely outcome of that determination is a factor considered in striking the voting constituency or constituencies at the pre-vote stage, because a pre-hearing vote is of little use unless one can reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board. The question we are obliged to determine at this stage is whether, against this background, it would be inappropriate to adopt the parties' agreement on the voting constituency description.

6. The general proposition that a raiding union should be required to take the incumbent's unit does not require that the language used to describe that unit be identical to the language employed in an existing collective agreement or certificate. There is often more than one way to describe a bargaining unit without affecting its actual or even potential composition. Here, for example, we have a craft unit description which appears to have remained unchanged for some period of time. Because it is a craft unit description, the words "stationary engineers" would ordinarily be taken to mean "employees employed as stationary engineers". The change from one phrase to another at best clarifies the original meaning and at worst does nothing to obscure it. Similarly, the reference to "Assistant Chief Engineer" in the original description functions as an indication of the level at and above which employees are excluded from the unit by reason of their functions, having regard to the provisions of section 1(3)(b) of the *Labour Relations Act*. The applicant, incumbent and respondent all now say that the person who occupies that position now holds the title "Assistant Director of Maintenance and Engineering". Again, the change in language does not change the composition of the bargaining unit, and adds no complication about which the Board would have been concerned if the question of bargaining unit description were arising as a matter of first impression. The added restriction of the unit to Metropolitan Toronto does not exclude from the unit anyone now represented by the intervener, as the respondent's operations are limited to that geographic location. It does restrict the potential scope of the unit; this, however, is highly academic having regard to the nature of the respondent's operations. As it makes no difference to voter eligibility, and would not offend any principle which the Board applies to the description of bargaining units as a matter of first impression, the change is not objectionable in this context.

7. We are troubled by the parties' addition of the words "persons covered by subsisting collective agreements" to the existing description. It is not at all clear what these words do to the actual scope of the bargaining unit described. The representation to the Labour Relations Officer was that workers with stationary engineer's "tickets" might be employed by the respondent otherwise than as stationary engineers and therefore fall within the scope of another collective agreement. That possibility is completely provided for by the words "employees employed as stationary engineers". It appears that the words "persons covered by subsisting collective agreements" contribute nothing to the definition or description of the bargaining unit or voting constituency, other than potential uncertainty and confusion.

8. Within narrow limits, it is open to the parties to a displacement application to agree upon a voting constituency description which is a different description of the bargaining unit represented by the incumbent trade union; indeed, this is to be commended if it make that description more intelligible and less ambiguous. The important qualification is that the new description must apply to all the employees covered by the existing description, and to no others. It should also remain as faithful as possible to the original description's potential scope, it should be consistent with the principles applied by the Board when the description of units arises as a matter of first impression, and it should not introduce any new ambiguity or uncertainty. Applying those principles to the agreement made by these parties, we are prepared to accept the first three of the changes noted in paragraph 4 of this decision, but not the last. Accordingly, we determine that the voting consistency for the purpose of the pre-hearing vote in this application shall be as follows:

all employees of the respondent in Metropolitan Toronto employed as Stationary Engineers, save and except Assistant Director of Maintenance and Engineering and persons above that rank.

In determining that this shall be the voting constituency, we have not finally adjudicated the description of the appropriate bargaining unit for the purpose of any certificate which might be issued as a result of this application. That issue is determined only after the vote is conducted, as will appear from an examination of the language of section 9(4) of the *Labour Relations Act*. As the voting constituency we have determined is different from the bargaining unit description to which the parties have agreed (in that it eliminates the words "and persons covered by subsisting collective agreements"), we would ordinarily direct that this matter be listed for hearing following the vote so that the parties can make representations to the Board with respect to the description of the appropriate bargaining unit. It may be, however, that the parties upon reflection will choose to adopt our voting constituency description as the description of the appropriate bargaining unit. In those circumstances, a hearing following the conduct of the vote would be unnecessary, unless any of the parties or employees affected requests one. We will therefore put the onus on the parties affected to advise the Board in writing, before the expiry of the period referred to in subsection 70(2) of the Board Rules of Procedure, if any of them wishes the Board to entertain the submission that the appropriate bargaining unit in this application should be described otherwise than as the voting constituency has been described in this decision. If no such written representation is made within that time, the application will be processed thereafter on the assumption that the parties agree that the appropriate bargaining unit in this application is as we have described the voting constituency.

9. It appears to the Board, on an examination of the records of the applicant and the records of the respondent, that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinbefore described were members of the applicant

at the time the application was made.

10. The Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the aforesaid voting constituency. All employees of the respondent in the voting constituency on December 7, 1984, who have not voluntarily terminated their employment or who have not been discharged for cause between December 7, 1984, and the date the vote is taken will be eligible to vote.

11. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their labour relations with the respondent.

12. The matter is referred to the Registrar.

1876-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **Simpsons Limited**, Respondent, v. Group of Employees, Intervener

Practice and Procedure — Representation Vote — Parties to pre-hearing application agreeing inter alia that terminated employees not eligible to vote — Agreement not determinative — Entitled to cast segregated ballots

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members I. M. Stamp and E. G. Theobald.

DECISION OF THE BOARD; December 7, 1984

1. By decision dated November 28, 1984, the Board directed that a pre-hearing representation vote be conducted in the following voting constituency:

VOTING CONSTITUENCY #1:
FULL TIME EMPLOYEES
(EXCLUDING OFFICE AND CLERICAL)

All employees of the respondent at 176 Yonge Street and 31 Richmond Street West, Toronto, save and except Department Supervisors, persons above the rank of Department Supervisor, security staff, management trainees, office and clerical staff, pharmacists, pharmacists student trainees, optometrists, persons covered by the subsisting collective agreement between the respondent and the Canadian Union of Operating Engineers, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university.

The Board noted the parties' agreement, for the purpose of clarity, that:

a) "Office and Clerical exclusions include Training and Sales Promotion,

who may be employed under Store, Regional or Head Office operations”;

- b) “Persons engaged in Regional or Head Office operations are excluded”; and
- c) “Persons employed by [third party] Concessionaires and Demonstrators employed by [third party] Vendors are excluded”.

The Board also directed that:

In view of the various positions taken by the applicant, respondent and by the intervening employees, each ballot cast by an employee in any of the following categories shall be segregated and not counted pending further order of the Board:

- a) employees of the respondent at 31 Richmond Street West;
- b) employees described by the respondent as “terminated effective November 3, 1984”;
- c) maintenance employees in Departments 6551 and 8157;
- d) switchboard employees;
- e) telephone sales employees.

The Board also directed that a Labour Relations Officer confer with the parties on the voters’ list and arrangements for the vote.

2. Representatives of the applicant, respondent and interveners subsequently met and agreed in writing on the exclusion from the voting constituency of the following groups of employees of the respondent:

- a) employees at 31 Richmond Street;
- b) switchboard employees; and
- c) telephone sales employees.

In paragraphs 3 and 7 of their written agreement, the parties also agreed:

- 3. That the employees described by the respondent as “terminated effective November 3, 1984” are not eligible voters.
- 7. That in the event that the segregated ballots become relevant the parties are in agreement that the Board appoint a Labour Relations Officer to deal with the segregated ballots and further in the event that the Board includes the segregated ballots in voting constituency #1 that

the Board shall count those ballots and not direct the taking of a second representation vote.

Having regard to the terms of the parties' agreement and the voters' list referred to in it, it is apparent that in speaking of "segregated ballots" in paragraph 7 of their agreement, the parties had in mind any ballots cast by maintenance employees in Departments 6551 and 8157, whom the applicant and respondent had throughout said should be included in, and the interveners had throughout said should be excluded from, the bargaining unit to be determined by the Board after the vote is conducted.

3. By letter dated December 3, 1984, a lawyer representing the applicant makes these submissions:

We are informed by Mr. Buchanan that the respondent company and the union have completely resolved their bargaining unit difficulties and, further, that a pre-hearing vote has been scheduled for December 14, 1984.

It would therefore appear that the only outstanding objections to the bargaining unit description are those advanced on behalf of a group of interveners.

It is our position that the interveners have no status to raise issues with respect to the scope of the bargaining unit. In any event, there can be no question that the bargaining unit description agreed to by the company and the union is completely consistent with the practice of Labour Relations Board for many years.

We would therefore submit that there is no necessity to segregate the ballots of the challenging employees, particularly where there may be some risk of a repeat vote should the result be close. At the very least we would submit that the interveners should show cause why the Board should proceed further with that objection.

We would ask that the Board address this matter prior to December 14th if that be possible, to avoid any difficulty which might arise after the ballots are counted.

The "Mr. Buchanan" referred to by the lawyer is the union representative who signed the written agreement of November 30th on behalf of the applicant.

4. We reject the submissions referred to in the next preceding paragraph. Apart altogether from their 11th hour nature and the apparent inconsistency with the applicant's having 3 days earlier acknowledged the need to segregate the ballots in question, we would not ordinarily ignore at this stage positions taken by a party arguably entitled to status, as the interveners arguably are: see *Tektron Equipment Corporation*, [1983] OLRB Rep. Nov. 1932; particularly paragraph 13, and the cases cited therein. We will not, therefore, revoke the direction in paragraph 5 of our decision of November 28, 1984 as it applies to employees described in subparagraph (c) of that paragraph.

5. Having regard to the agreement of the parties, we hereby vary the voting constituency described in our decision of November 28th so as to read:

All employees of the respondent at 176 Yonge Street, Toronto save and except Department Supervisors, persons above the rank of Department Supervisor, security staff, management trainees, office and clerical staff, pharmacists, pharmacists student trainees, optometrists, persons covered by the subsisting collective agreement between the respondent and the Canadian Union of Operating Engineers, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university.

For the same reason, we note the parties' agreement on the exclusion from the voting constituency of switchboard and telephone sales employees, and will treat that agreement as if it were a clarity note.

6. As to the matters referred to in paragraphs 3 and 7 of the parties' agreement of November 30, 1984, we can do no more than note the parties' agreements on those matters. We cannot adopt either paragraph as a ruling of the Board. We are not here determining the appropriate bargaining unit; the statute expressly leaves that question to be determined after the vote is conducted, and after further notice is given to all affected, including employees, of the opportunity to make submissions to the Board with respect to any matter still to be determined in the application. The agreement of the applicant and respondent on the right of an employee to vote is not determinative of that issue. As in any case, if any person attends and requests an opportunity to vote, that person will be permitted to cast a ballot even if that person's entitlement to vote is disputed by one, or even every, of the parties to the application. Such a ballot is segregated as a matter of course, and the eligibility to vote of the person who cast it is determined by the Board after the voting is complete. Similarly, the counting procedure adopted when ballots have been segregated is for the Board to determine after the vote is complete. Whether or not the immediate counting of unsegregated ballots creates a danger that a second vote will be necessary is something to be assessed at the time the Board assesses whether or not to adopt that course.

7. The matter is referred to the Registrar.
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2363-84-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666, on its own behalf and on behalf of the affiliated Bargaining Agents of the Employee Bargaining Agency, Applicant, v. Allan Leslie Stewart, carrying on business under the firm name and style of **Standard Plumbing**, Respondent

Certification — Constitutional Law — Employer alleging that certification of union will result in denial of right “to pursue gaining of livelihood” — Claiming contrary to *Charter of Rights* — Board rejecting charter argument and certifying union

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. P. Wilson and H. Kobryn.

DECISION OF THE BOARD; December 21, 1984

1. In this application for certification the applicant filed two certificates of membership. The certificates are signed by the members and indicate that monthly dues of \$12.00 have been paid for at least one month within the six-month period immediately preceding the terminal date of this application. The certificates are checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, but failed to file a list of employees and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. Section 13 of the reply contains the following comments:

“The respondent carries on business largely in the renovation or remodelling and repair of residential premises. The Respondent is a sole proprietorship registered by Allan Leslie Stewart and the said Allan Leslie Stewart is the sole employee, by and large, of the Respondent. In May, 1984, Standard Plumbing obtained the contract from Valleypark Lodge Nursing Home in Niagara Falls for plumbing. As the Respondent was unable to perform all of the work on the contract himself, he approached two individuals known to him personally to enquire if they might be interested in working for Standard Plumbing. The Respondent requested the two individuals, who were known to the Respondent to be members of the Applicant, to enquire of the Applicant if the Applicant had worked for these individuals. The individuals made the enquiries and were advised by the Applicant that the Applicant could not place them for work. This information was related to the said Allan Leslie Stewart and the Respondent hired the two individuals on the understanding that the hiring would not be permanent and that they would be laid off when the contract was completed. The Respondent is not in a position to successfully bid on jobs requiring union rates to be paid and does not propose to bid on such jobs or for contracts requiring “union” Plumbers.

The hiring above referred to was the only occasion during the history of Standard Plumbing that the said Standard Plumbing hired additional Plumbers.

The term of the hiring for one of the individuals was from May 1st, 1984 until December 1st, 1984 and period of hiring for the second of the above-mentioned individuals was June 28th, 1984 to December 1st, 1984.”

3. In paragraph 14(2) of the reply the respondent consents that the Board dispose of the application without a hearing and states as follows:

“The Respondent repeats the statements contained in paragraph 13 of this reply as is specifically recited herein;

The Respondent does not propose, in the future, to bid on contracts requiring “union” labour or Plumbers;

The Respondent maintains that the application herein and the certification, if granted, would constitute a violation of the rights of the Respondent as set forth in the Canadian Charter of Rights and Freedoms being Part I of the Constitution Act, 1982 and in particular, Section 6(2)(b) in that the sole proprietorship and the said Allan Leslie Stewart would be denied the right to pursue the gaining of a livelihood or the gaining of the livelihood would be impaired by the certification.”

The respondent has raised a Charter issue notwithstanding his decision to waive a hearing before the Board and has referred the Board to section 6(2)(b) of the Charter of Rights and Freedoms. That section falls under the general heading of “Mobility Rights” and provides that:

“Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

• • •

(b) to pursue the gaining of a livelihood in any province.”

In the Board’s view, section 6(2)(b) does not deal in the abstract with a right to pursue the gaining of a livelihood, rather it deals with the right not to be restricted as to the province in which the right is exercised. Even if the Board is wrong, however, there remains to be considered the effect of section 6(3)(b) of the Charter, which explicitly limits the right specified in section 6(2)(b) as follows:

“Limitation

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and . . .”

The Board is of the view that this limitation is a complete answer to the respondent’s assertion. Certification is pursuant to the *Labour Relations Act*, which is a law of general application

in force in Ontario, and which does not discriminate among persons on the basis of province of present or previous residence. Thus, even if section 6(2)(b) could be said to comprise a right not to be certified — a proposition the Board considers of dubious merit — section 6(3) provides that general application laws such as the *Labour Relations Act* override the rights set out in subsection 2.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 12, 1978, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides:

An application for certification as bargaining agent which relates to the industrial, commercial and institu — tional sector of the construction industry referred to in clause *e* of section 117 shall be brought by either,

(a) an employee bargaining agency; or

(b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. The Board further finds, pursuant to section 144(1) of the Act, that all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on December 6, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour*

Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

8. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

... , the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 4 above in respect of all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

9. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

10. If the respondent believes that the Board has erred with respect to the respondent's representations on the Charter of Rights, it may seek reconsideration of the Board's decision. If the respondent chooses to do so, its request should include all written submissions in support of the request.

2335-84-R Ontario Public Service Employees Union, Applicant, v. St. Clair College of Applied Arts and Technology, Respondent

Practice and Procedure — Representation Vote — Respondent to pre-hearing application objecting to Board's jurisdiction — LRO meeting or conduct of vote not postponed until jurisdictional issue resolved

BEFORE: Harry Freedman, Vice-Chairman, and Board Members H. Kobryn and W. G. Donnelly.

DECISION OF THE BOARD; December 12, 1984

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. By decision dated November 23, 1984, the Board appointed a Labour Relations Officer to confer with the parties and review, among other things, the description of the voting constituency and the records of the applicant and respondent to obtain the information necessary for the Board to determine whether the applicant has passed the threshold requirement contained in section 9(2) of the Act.
4. The respondent submitted in its reply, by way of preliminary objection to the application, that the Board does not have the jurisdiction to deal with this application and requested that the Board conduct a hearing to decide the jurisdictional issue before a meeting is held with a Labour Relations Officer or a pre-hearing vote is conducted. The Labour Relations Officer was authorized by the Board's November 23rd decision to convene a meeting of the parties and such a meeting was held despite the objection taken to the procedure by the respondent. At that meeting, the respondent renewed its preliminary objection to the jurisdiction of the Board to process this application and advised the Labour Relations Officer that it was participating in the meeting and vote arrangements without prejudice to its position that the Board did not have the jurisdiction to order a pre-hearing vote, and further that no vote be conducted until the jurisdictional issue is determined by the Board after a hearing is conducted.
5. An application for certification can give rise to a large number of issues, some of which can be characterized as jurisdictional, and those issues that remain in dispute will be resolved by the Board after a hearing is conducted where all parties affected are given the opportunity to present their evidence and make their submissions to the Board (see section 102(13) of the *Labour Relations Act*. We do note, however, that the Board need not conduct a hearing into applications for certification relating to the construction industry, pursuant to section 102(14) of the Act. The Board directs a representation vote in an application for certification filed under section 7 of the Act, only after a hearing where issues similar to the one raised by the respondent in this case are dealt with. However, an application for a pre-hearing vote is processed in a different manner. Unless the Board is of the opinion that the pre-hearing vote application gives rise to concerns or issues that are so complex that there is no reasonable utility in conducting a vote before resolving those concerns or issues, the Board directs the taking of a pre-hearing vote. Where such complex concerns or issues are raised, the Board has the discretion under section 9(1) of the Act and section 5 of the Board's Rules of Procedure to refuse to entertain

the pre-hearing vote application and direct it to be processed in the usual way. (See *Central Hospital*, [1982] OLRB Rep. March 347 at 348; *Howard Furnace Ltd.*, [1961] OLRB Rep. July 98.)

6. The pre-hearing vote procedure exists to permit the Board to promptly conduct a vote among the employees who are subject to the application for certification. (See *Emery Industries Ltd.*, [1980] OLRB Rep. March 316 at page 319; *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. April 468 at pages 483-484; *Central Hospital*, *supra*; *Savette Family Department Store Ltd.*, [1974] OLRB Rep. May 327; *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989.) The jurisdictional issue raised by the respondent in this case, and in our view, the vast majority of issues that might be raised in relation to a pre-hearing vote application for certification need not be decided by the Board before the pre-hearing vote is conducted. We adopt and apply the reasoning of the Board in *Satin Finish Hardwood Flooring Limited*, [1984] OLRB Rep. Nov. 1603 in which the Board wrote at paragraph 10:

“While it is necessary for the Board to know the parties’ positions on relevant issues before it can make the determinations contemplated by subsection 9(2) of the Act, it is not necessary for the Board to resolve their differences on those issues before making those determinations. Because the Board need only identify and delineate the conflicts rather than resolve them, it is only the most unusual case in which the officer’s report on his meeting with the parties will be an insufficient basis on which to make the determinations called for by subsection 9(2). Although it is not in this case, it may occasionally be necessary for the panel to consult directly with the parties, rather than receive their positions through the officer or in writing; there should never be a necessity for a formal pre-vote evidentiary hearing in a pre-hearing vote proceeding. There may well be cases in which the issues of fact and law raised by the parties are so complex that some or all of them must be resolved before there can be any potentially beneficial resort to a representation vote. The appropriate response in such cases is to decline to exercise the discretion to order a pre-hearing representation vote and, instead, direct that the application be processed in the ordinary manner: see *Howard Furnace Limited*, [1961] OLRB Rep. July 98. We do not feel that the issues raised in this case require that response.

Thus, we are of the view that the respondent’s preliminary objection is not a sufficient basis for us to refuse to process the application for certification under section 9 of the *Labour Relations Act*.

7. It appears to the Board on an examination of the records of the applicant and the records of the respondent that not less than thirty-five per cent of the employees of the respondent in the voting constituency hereinafter described were members of the applicant at the time the application was made.

8. The parties have agreed to the following voting constituency:

all employees of the respondent at Windsor, Chatham and Wallaceburg, Ontario, regularly employed for not more than twenty-four (24) hours per

week and students employed during the school vacation period, save and except foremen and supervisors above the rank of foreman and supervisor.

9. All employees of the respondent in the voting constituency on the 6th day of December, 1984, who have not voluntarily terminated their employment or who have not been discharged for cause between the 6th day of December, 1984, and the date the vote is taken will be eligible to vote.
10. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
11. In view of the preliminary objection made by the respondent, the Board directs that the ballot box be sealed and that this application be listed for hearing after the representation vote is conducted.
12. This panel of the Board is not seized with this matter.
13. This matter is referred to the Registrar.

2241-84-R London and District Service Workers' Union Local 220, SEIU — AFL — CIO — CLC, Applicant, v. **Stratford Shakespearean Festival Foundation of Canada**, Respondent, v. Group of Employees, Objectors

Bargaining Unit — Practice and Procedure — Employees hired only during mailing periods — Not meeting seven-week rule — Evidence clear employees work over 24 hours per week whenever employed — Seven-week rule not applicable — Employees full time

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Randy Levinson, Roy Jacques, Kirsten Bradley, Robert Jones, Elaine Jones and Laura Lynn Bell for the applicant; S. L. Moate and G. Thomas for the respondent; Heather Keith, Beth Kehna and Pat Chandler for the group of employees.*

DECISION OF THE BOARD; December 20, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties to this application met with a Board Officer prior to the hearing scheduled for it. They reached agreement on all matters in dispute between them except two. Both issues relate to whether certain persons should be included in or excluded from the bargaining unit which the parties have agreed is appropriate for collective bargaining.

4. Having regard to the agreement of the parties, the Board finds that all office and clerical employees of the respondent in Stratford, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the Foundation, secretary to the executive director, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Having further regard to the agreement of the parties and for purposes of clarity, the Board declares that the position of data processing manager is excluded from the bargaining unit described above.

6. The parties disagree whether Joanne Knechtel, Assistant Box Office Manager, is included in the bargaining unit. The respondent takes the position that she exercises managerial function within the meaning of section 1(3)(b) of the Act and should be excluded. The applicant takes the contrary position. The parties are also disagreed whether Doris Hussey, Clover Ladouceur, Mary Mulford and Beryl Somars are captured by the exclusion "... persons regularly employed for not more than twenty-four hours per week ...". The applicant contends that they are part-time employees within that definition and should be excluded from the bargaining unit and the respondent takes the contrary position.

7. Hussey, Ladouceur, Mulford and Somars form the nucleus of extra staff whom the respondent engages periodically during the year to handle mailings of brochures to members, ticket subscribers and other target groups of the general population. There are four regular mailings a year and some *ad hoc* ones. The duration of work on each mailing ranges from one week to seven or eight weeks depending on the particular mailing. The four persons in question were at work on a mailing when the application was made. At the date of hearing, they had worked five full weeks on the mailing. During the week in which the application was made, the four employees worked 36 1/2 hours or more. During the full week prior to the week of the application, they worked between 28 and 32 hours. In the week before that, they worked between 34 1/2 and 35 hours. On the Friday preceding that week, two of the four employees worked for seven hours each. It is clear from the evidence that similar patterns of employment apply to the other mailings; in other words, the employees work full-time for the duration of the mailings. It is common ground that, but for the exclusion of part-time employees from the bargaining unit, the work in question would be work performed by members of the bargaining unit.

8. Applicant counsel asked the Board to consider the seven weeks immediately prior to the making of the application as a representative period of employment and determine from the number of hours worked during those weeks whether each of the four persons are regularly employed for not more than 24 hours per week. Counsel contends that there are no conditions present which the Board has previously considered to be cause for using a different period as being representative. In this respect he referred the Board to its decisions in *Trenton Memorial Hospital*, [1980] OLRB Rep. Jan. 116 and *Holiday Inn Yorkdale — Commonwealth Holiday Inns of Canada*, [1976] OLRB Rep. Nov. 709. Were the Board to do so, the parties are agreed that the Board would conclude that the four persons were employed for not more than 24 hours per week and would be excluded from the bargaining unit. Respondent counsel concedes that the Board does usually look to a representative period of seven weeks immediately preceding the date when the application was made when resolving issues of whether a person is a part-time employee. This is the guideline which the Board adopted in its decision in *Sydenham District Hospital*, [1967] OLRB Rep. May 135. Respondent counsel contends that the regular pattern

of the employment relationship of these four persons makes it inappropriate to apply the guideline to them because, while they work only periodically during the year, they regularly work more than 24 hours per week whenever they do work.

9. The Board agrees with applicant counsel that none of the conditions considered by the Board in its *Trenton Memorial* and *Holiday Inn* decisions, *supra*, are present here so as to cause the Board to look at a longer or shorter period of time as being representative for any of the four persons. The Board does not agree, however, that the seven week rule has application in this case. While it is necessary for the Board to determine whether Hussey, Ladouceur, Mulford and Somars are captured by the exclusion "persons regularly employed for not more than twenty-four hours per week", it is unnecessary for the Board to apply the seven week rule in order to make the determination. It is abundantly clear on the facts that, whenever they are required to work, they regularly work more than 24 hours per week.

10. In the result, the Board finds that Doris Hussey, Clover Ladouceur, Mary Mulford and Beryl Somars are employees of the respondent in the bargaining unit described above. That leaves the question of whether Joanne Knechtel is included in the bargaining unit. Regardless of how that issue is decided the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on November 26, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. There were filed with the Board, however, seven statements of desire ("petitions") opposing the application for certification. Sufficient of the petitions were filed by employees who also signed membership cards as to raise doubt concerning the continued support for certification of the applicant. Therefore, if the Board finds that the petitions represent the voluntary wishes of the employees who signed them, the Board would exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken in spite of the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time. It will be necessary, therefore, for the Board to inquire into the preparation, circulation and filing with the Board of the individual petitions.

12. A Board Officer is authorized to inquire into and report to the Board on the duties and responsibilities of Joanne Knechtel, Assistant Box Office Manager of the respondent.

13. This application is referred to the Registrar for the appointment of the Board Officer and to be listed for continuation of hearing on the next available date for the purpose of inquiring into the preparation, circulation and the filing of the petitions with the Board, and for dealing with any other matters which, at the time of the hearing, are outstanding.

2450-84-U Toronto Transit Commission, Applicant, v. Amalgamated Transit Union, Local 113, A. E. Bolen, R. G. Clatworthy, W. A. Hughes, K. N. Killam, R. LeBlanc, D. T. McCann, W. Moreau, L. A. Trotter, Art Patrick, Paul McLaughlin and Larry Kinnear, Respondents

Strike — TTC drivers refusing to drive buses across picket lines set up by Eaton's employees on lawful strike — Constituting strike although no intention to obtain concessions — *Domglas* definition of "strike" followed — Prohibition against untimely strikes in Act absolute — Employer not waiving rights by tolerating similar conduct in past

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *D. K. Gray, J. A. Baker and I. MacPherson for the applicant; H. M. Pollit and Arthur W. Patrick for the respondents.*

DECISION OF THE BOARD; December 7, 1984

1. This is an application under section 92 of the *Labour Relations Act* alleging that the named respondent employees have engaged in and are continuing to engage in an unlawful strike, and that the respondent union has counselled, encouraged, procured, or supported that strike. Both actions are said to be contrary to section 8 of the "*T.T.C. Act*". Here I am adopting the terminology used by counsel in reference to the *Toronto Transit Commission, Greycoach Lines, Limited and GO Transit Labour Disputes Settlement Act 1984*, S.O. 1984, c.42. The respondents concede that if the conduct that occurred here is a "strike", it must necessarily be an unlawful one by virtue of the *T.T.C. Act* and, likewise, the union's encouragement, etc. would also be unlawful.

2. Given the nature of this case, and in accordance with the Board's usual practice, the Board directed the abridgement of the time limits for filing pleadings, and put the matter on for hearing quickly. No objection was taken to this procedure, nor was there any claim of prejudice. In fact, as it turned out, the facts were not substantially in dispute.

3. There is currently ongoing a lawful strike against the T. Eaton Company. In connection with that strike there are picket lines at or near various Eaton stores, including one located in the Scarborough Town Centre. Most of the individual respondents are bus drivers who have refused and are continuing to refuse to drive their vehicles across those picket lines. Various reasons were given, including: that the decision was a personal one, that there were safety concerns, and that they had been told by their trade union not to cross. Indeed, Art Patrick, a member of the union's executive board, advised the T.T.C. that the executive board had voted unanimously to endorse the picket lines and that, therefore, union members would not cross them. It is hardly surprising, therefore, that the individual employees were prepared to follow their union's recommendation. As a result, supervisory staff have been required to step in and take charge of the vehicles so that normal service can be maintained.

4. I might also note, and again it is not disputed, that in late October or early November — that is about a month prior to the incidents giving rise to this complaint — the T.T.C. informed the union that it had reconsidered its established policy respecting picket lines, and that henceforth the T.T.C. would no longer make efforts to accommodate its drivers or their union with such actions as re-routing vehicles or having supervisory people available, in order

that the drivers would not have to cross the picket lines themselves. It was, or should have been clear that whatever may have been done in the past, the drivers would now be expected to maintain normal service and carry out their regular driving responsibilities despite the presence of picket lines.

5. There were some minor disputes about details of particular past strike situations, but it is clear that until recently, the T.T.C. *has* had a policy of trying to accommodate its drivers' concerns, both in respect of safety problems which might arise if they were asked to take their buses across picket lines, and, more fundamentally, their natural aversion to contravening the commonly held principle of trade union solidarity. The union points out that the T.T.C.'s new stance involves a fundamental change from a past practice which has been in place for over thirty years. The union also points out that the actual amount of disruption is minimal, because there are supervisors at hand to take the buses across the lines and maintain normal service.

6. These are the essential facts. I shall turn to their significance in a minute. First, it may be useful to refer briefly to the definition of strike contained in the *Labour Relations Act*. That section reads as follows:

1. -(1) In this Act,

• • •

(o) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

7. The definition of the term strike came before the Board some years ago in what was also something of a high profile case involving the C.L.C.-sponsored protest against wage controls which took place in October, 1976. (See, *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569.) In that case, a number of employees left their jobs and refused to work because of their disapproval of the federal wage control legislation. There was no dispute with their own particular employers. The work stoppage had a broader political motivation, although it undoubtedly had the affect of interfering with or interrupting production. An employer, Domglas, sought a cease and desist direction in much the same way as does the T.T.C. here.

8. At page 573 the Board had this to say:

12. The definition of strike as found in the *Labour Relations Act* appears broad enough to encompass the kind of work stoppage that is the subject matter of this application. On its face, the statutory definition appears to require only that the work stoppage, or other disruption of work, result from the combined or concerted action of employees. The two essential conditions for conduct to be characterized as a strike, therefore, appear to be: 1) concerted employee activity; 2) some disruption of the employer's operation. The question is whether we should read into this definition a further condition that the conduct be carried out for the purpose of obtaining concessions from the employer, or some other employer.

The Board went on to say that there need be no intention to extract concessions from the

employer — that is, the definition of strike was broad enough to encompass purely sympathetic action such as that which is charged here. This decision, including the part that I have read, was approved in a unanimous decision of the Divisional Court reported as *Re United Glass and Ceramic Workers of North America et al.* (1978), 19 O.R. (2d) 353. For the purpose of completeness, I might also mention the more recent decision of the Supreme Court of Canada in *Maritime Employers Association*, 78 CLLC ¶14,171, where the Court affirmed that a refusal to cross picket lines because of the commonly held belief in union solidarity was nevertheless a “strike”.

9. Section 8 of the *T.T.C. Act* is quite clear and specific. There is an absolute prohibition on all strike activity. The question then, as I see it, is whether the existence of a past practice which either tolerated what would otherwise be an unlawful strike, or put employees in a position where they would not have been prompted to engage in an unlawful strike, somehow changes the character of the employees’ conduct today. I do not think that it does.

10. Counsel for the respondents point to section 8(2) of the *T.T.C. Act* which, he rightly says, preserves in force employee privileges which were in effect prior to the passage of the legislation. One such “privilege”, he says, was a right to be accommodated in respect of the employees’ reluctance to cross picket lines.

11. I have difficulty accepting that submission since it seems to me that, in substance, counsel is asserting a “privilege” frozen by section 8(2) to engage in a concerted work refusal — a work refusal of the kind which is expressly prohibited by the opening provisions of section 8. I also note parenthetically, that if there is a dispute as to the employer’s obligations or those of the employees, or if there is some question as to what is “frozen” or what is required, section 8(4) of the *T.T.C. Act* seems to contemplate an arbitration remedy. The remedy for the employer’s change of policy, if any, lies elsewhere — not in a concerted refusal to work or a refusal by employees to carry on their normal responsibilities despite the picket line.

12. I am reinforced in my view by several of the earlier cases which have arisen before this Board. For the very reason that there are commonly held views regarding the “obligation” to respect picket lines, cases such as the present one have come up before. Circumstances such as those present in this case are, in fact, by no means novel.

13. In both *King Paving*, [1976] OLRB Rep. June 291 and *Associated Freezers of Canada Limited*, [1972] OLRB Rep. May 445, there was a concerted refusal by employees to cross picket lines set up by another union. In both cases, the respondent employees pointed to a clause in their collective agreement which expressly allowed them to refuse. In other words, in both cases there was not just an established employer practice, but an express and purportedly binding contractual statement as to the parties’ rights in the very circumstances under review. But in each case the Board said — to put the matter colloquially — “you cannot contract out of the Act”. The “no-strike ban” is imposed by statute as a matter of public policy, not the private convenience of the parties. It admits of no exceptions. Any private arrangement which attempts to circumvent or avoid the thrust of the Act is void. I do not see how the parties’ practice can stand on a higher footing than an express clause in their collective agreement; but even in the latter case, the Board has clearly found such clauses to be void.

14. It seems to me that, in the instant case, the conclusion is inescapable: the employees have engaged in a strike. There was a refusal to do work which they were assigned to do. That refusal was undertaken in concert, and, indeed, was prompted, at least in part, by their own

union which has encouraged their show of solidarity. That being so, I do not see how it can be said they were not engaged in a strike, nor do I see why the employer should not be entitled to the remedy contemplated by the statute.

15. Now, lest there be any misunderstanding, I do not minimize the importance to many employees of the principle which the union has expressed in its resolution to respect the picket line, nor the real pangs of conscience which individual members may feel — particularly in the emotionally charged circumstances of this particular strike. However, those principles are not ones which find support in the law.

16. I also do not minimize a union's real concern that in an accommodation which has worked amicably for thirty years has, from the union's point of view, been rejected with unseemly haste, insufficient discussion, and an appearance of partisanship not exhibited in the past. The union may even be right that the employer's reversal of policy will sow seeds of discontent which will exacerbate labour relations problems in an important public system where, heretofore, relationships have generally been amicable. However, the wisdom of the employer's actions are not for me to judge; and even if I were to find that they were unwise, I do not think that would be sufficient to deprive the employer of a remedy to which it is otherwise entitled.

17. For the foregoing reasons, then, the Board makes the following declarations and directions:

1. Amalgamated Transit Union, Local 113, has authorized an unlawful strike and Art Patrick, Paul McLaughlin and Larry Kinnear, as officers, officials or agents of Amalgamated Transit Union, Local 113, have counselled, procured, supported or encouraged an unlawful strike.
2. A. E. Bolen, R. G. Clatworthy, W. A. Hughes, K. N. Killam, R. LeBlanc, D. T. McCann, W. Moreau, and L. A. Trotter, employees of the Toronto Transit Commission who operate T.T.C. vehicles, have engaged in an unlawful strike.
3. Amalgamated Transit Union, Local 113 shall cease and desist from authorizing an unlawful strike, and Art Patrick, Paul McLaughlin and Larry Kinnear, as officers, officials or agents of Amalgamated Transit Union, Local 113, shall cease and desist from counselling, procuring, supporting or encouraging an unlawful strike.
4. A. E. Bolen, R. G. Clatworthy, W. A. Hughes, K. N. Killam, R. LeBlanc, D. T. McCann, W. Moreau, and L. A. Trotter, employees of the Toronto Transit Commission who operate T.T.C. vehicles, shall cease and desist from engaging in an unlawful strike.

18. There is no reason, at this stage, to believe that any further remedy is required. Accordingly, the request for further relief listed on Schedule "D" of the complaint is dismissed.

2672-83-R The Canadian Union of Public Employees, Applicant, v. Willows Estate Nursing Home, Respondent

Employee — RNA's acting as "charge nurses" not exercising managerial functions — Drawing parties' attention to Board decision dealing with duty of fair representation problems created by person with limited supervisory role also holding union office

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. G. Donnelly and B. L. Armstrong.

DECISION OF THE BOARD; December 5, 1984

1. This is an application for certification in which the status of the Home's Registered Nursing Assistants remains in dispute. The Board has now reviewed the report of the Labour Relations Officer, together with the submissions of the parties in this matter.

2. As is normally the case, the respondent at this Home at all times has one individual designated to be "in charge" of each of the floors on each of the shifts. At this particular Nursing Home, this individual is either a Registered Nurse or a Registered Nursing Assistant, and is designated by the familiar term "charge nurse". Part-time Registered Nurses and Registered Nursing Assistants are designated as "assistant charge nurses". There is also one individual designated at the Home as the "senior charge nurse", and a Director of Nursing to whom all registered staff report. The respondent submits that the Registered Nursing Assistants acting as "charge nurses" in this case have responsibilities which place them in the kind of conflict of interest to which section 1(3)(b) of the Act is directed. Whether the respondent is correct or not is a question of fact.

3. Section 1(3)(b) provides:

1.-(3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions . . .

Initially in its jurisprudence, the Board looked in applying section 1(3)(b) for evidence of the authority to make independent decisions in a way that materially affects the economic lives of other employees. See the discussion, e.g., in *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, at paragraph 3. More recently the Board has expanded the test to include persons who, by virtue of a proven power to make "effective recommendations", can impact on the economic lives of employees in the same way as the actual decision-maker can; see *McIntyre Porcupine*, [1975] OLRB Rep. April 261. In making its factual assessment, as well, the Board has always been careful to take into account the norms of the industry in which the question arises. But even in the standard industrial context, the typical "lead hand" or "team leader" has not been found to exercise "managerial functions" by virtue of the assignment only of a special degree of responsibility for the co-ordination and effective performance of work on the part of the particular crew or group of employees of which he is a part. See, e.g., *Rehau Plastics*, [1979] OLRB Rep. Sept. 910, at paragraph 3.

4. In the nursing-care setting, specialized training, standards of professional responsibility, and "collegial" forms of decision-making have added to the difficulty of drawing the "managerial" line in some cases. The Board recently took the time to review these problems in the case of *Ottawa General Hospital* [1984] OLRB Rep. Sept. 1199. There the Board observed:

13. Persons who exercise skills, or perform functions which reflect their own specialized training or responsibilities, will necessarily have a specialized role to play in respect of those with lesser or different training and experience. Frequently, it is only the most experienced, highly trained, or specialized employees who will fully understand the technical requirements of a particular job, and whether it is being done in the safest and most efficient manner. It is part of their job to ensure that appropriate techniques are being applied, and that the work is being done properly. Their expertise and technical judgment are an integral part of the group effort. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees — but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining. To adopt so rigid a view would deny thousands of skilled or professional employees the right to engage in collective bargaining, simply because they typically work in semi-autonomous work groups which include a variety of individuals with a lower level of skill, education and training or sometimes perform an assigned role as teacher and trainer — a role which inevitably involves some degree of evaluation — rendering a kind of "report card". In a blue collar context "master craftsmen" typically perform such functions in respect of "journeymen", "apprentices" and assorted "helpers". In a university setting, appraisal by professional peers is institutionalized, and it is not at all unusual for "tenure committees" composed of professors and associate professors to determine whether an assistant professor will move to the ranks of those whose job security and income status are much more secure. But this does not mean that these individuals are precluded from engaging in collective bargaining or, for that purpose, should not be treated as "employees" of the university. This is not to deny that professional or technical employees may also exercise "managerial functions" within the meaning of section 1(3)(b). It is simply that there must be a careful appraisal of the context, and the focus should be upon those powers exercised by the disputed individual which have a significant, direct, and provable impact (positive or negative) upon the terms and conditions of employment of the alleged subordinate employees. It is that kind of function which raises the "collective bargaining" conflict to which section 1(3)(b) is addressed, and it is this collective bargaining purpose which must be kept in mind when the Board is exercising the broad authority granted to it under section 1(3)(b), and is forming its "opinion" in particular cases.

14. Of course, these themes are not new to the health care industry. Nurses were one of the first professional groups to organize and engage extensively in collective bargaining; and it is not surprising, therefore, that many of these issues were first canvassed in cases involving nurses or other health care

professionals. Often the person in question was a "head nurse", "charge nurse" or other person "in charge" of a hospital ward, and responsible for supervising the activities of the various R.N.'s, R.N.A.'s, health care aides, orderlies, kitchen staff, and so on, who made up the "health care team". These "head nurse" cases usually arose in a hospital setting and the significant feature of these cases is the extent to which the Board focused on the special role of professional employees, and declined to equate supervisory or co-ordinating duties inherent in that role, with managerial functions. Thus, in *Essex Health Association, supra*, the Board wrote:

Professional or semi-professional employees such as head nurses and nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons' professional or technical skills. While nurses may give certain directions to others, e.g. orderlies, in the exercise of their professional skills, these directions are not dissimilar to the directions given by a journeyman to an apprentice in other crafts. Again, the reporting functions exercised by head nurses in this case may be likened to the reports one may expect from a journeyman concerning the progress of the apprentice. *The head nurses report but they do not initiate independent action with respect to the employment status of others who must follow the assignments given by the head nurse. . . .*

(original emphasis)

It is the co-ordinating, monitoring and reporting functions of registered nursing staff serving in the capacity of "head" or "charge" nurse which brings them to the periphery of the definition of "employee" under the Act. And about these functions the Board in *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154, had this to say:

11. Head nurses stand at the very boundary between the employee group and management. The head nurse in this particular case is indicative of the role usually played by head nurses. Head nurses form a link or a liaison between management and other employees; they are in charge of a hospital floor and therefore assume many different functions. For example, a head nurse is still involved in patient care. Because of her experience she may be called upon by other nurses prior to consulting the doctor. She may also be required to assist in the orientation of nurses who are new to that particular floor. Neither of these roles is a management function, but is merely the function of the training and experience of head nurses. In addition, the head nurse carries out limited administrative duties. For example, she co-ordinates the policies of the hospital on her floor with respect to staffing. She sees that the scheduling and arranging of personnel is such that there is adequate coverage for patients. This scheduling is

carried out in correspondence with a predetermined policy and the head nurse is merely implementing policies decided at a higher level. This implementation should not be confused with the decision-making or control function that goes hand in hand with management.

12. Also, the head nurse forms a conduit between the general staff on her floor and management, or to put it another way she has a reporting function. In this function she is a liaison between management and other employees; she enables management to “keep its ear to the ground” and in touch with the daily operations and functions of the hospital, and at the same time she is a part of the vehicle for management to convey policies and decisions to other employees. Again, this reporting function should not be confused with the exercise of managerial duties. The duty to manage and the concept of a managerial function requires a corresponding and correlative responsibility. The head nurse in this case does not have that type of responsibility that one envisions as being managerial.

5. In the present case, the charge nurses will have 4 to 5 aides, being either health care, nurse's or housekeeping aides, working under them. The responsibility of the charge nurses evidenced here to assign work, train employees and ensure proper coverage of their floor is neither unusual nor “managerial”. Nor is the resort to them by the Home for an evaluation of the performance and professional competence of employees working under them during the probationary period of their employment. This reflects no more than the consultative process one would expect with the professional individuals working most closely with these probationary employees. More important would be the ability to make effective recommendations with respect to wage increases, discipline or termination of employees on an ongoing basis, and there is no evidence in the transcript that this is done. The charge nurses do fill out and file from time to time written “evaluation reports” concerning problems they may have with the performance of other staff. The witness testified with respect to one of these reports that her “recommendation has been followed through in the past”, but on further examination, it became apparent that the witness saw her role as simply noting examples of inadequate standards of performance for management's consideration, and that no recommendation at all was made as to what action the charge nurse felt was justified. Her function, therefore, appears more in line with the reporting or conduit function alluded to in the *Peterborough Civic* case, *supra*, than with a “managerial” function. With respect to the “written reprimands” that the respondent submits are issued by the charge nurses in this case, the evidence does not make it clear how the evaluation reports relate to the overall disciplinary process at the Home or even the new disciplinary process discussed at a meeting a short time prior to the witness giving her evidence (and possibly after the application, or “cut-off” date of the present proceedings). The best information the charge nurse who was examined could offer as to how this employee evaluation is used is that it “goes on their employee folder, I guess”.

6. Unlike the “written reprimand”, the transcript makes clear that the witness has always felt that she had the authority to issue *oral* reprimands on a daily basis, but it is apparent from the discussion of the types of matters involved that all of these matters relate to the proper care of the resident, ranging from inadequate timekeeping by the staff-member, to the incorrect method of lifting a resident, and appear on the evidence to be traceable to the charge nurse's technical expertise and professional responsibility, more than to any “disciplinary” role as a member of management.

7. With respect to hiring, the charge nurse can recommend for employment someone that she knows, or give her opinion on someone she has worked with before, but the final decision is made by the Director of Nursing. The charge nurse plays no role in the interviewing of new prospective employees. At one point the charge nurses as a group recommended to the Director of Nursing an increase in staff, but “not much” happened. The charge nurse can only authorize the working of overtime to cover a shift on an emergency basis, and only if the Director of Nursing is herself not available. The charge nurse can approve an employee leaving early on a shift only if the employee has been successful in arranging for someone to cover. Otherwise, the matter must go to the Director of Nursing. Similarly, all requests by employees to switch shifts must be submitted to the Director of Nursing, who has the responsibility at this Home for all scheduling. The charge nurses also participate in what the respondent described as “management” meetings, and which are made up of the “registered nursing staff” of the Home. These meetings, however, appear to be no more than is consistent with the role of the professional nursing staff of the Home acting as conduits for the implementation or communication of management’s policy to the full staff. There was, once again, no development in the evidence of the discussion of the disciplinary process which took place at one of these meetings, or even the date as of which such a meeting occurred.

8. Each case must turn on its own facts, but it is necessary for the Board to develop through its experience certain broad tests against which each set of facts can be measured, in order to be able to provide some measure of continuity and predictability in the community. On all of the evidence here, the Board cannot conclude that the Registered Nursing Assistants, acting in the capacity of “charge nurses” at Willows Estate Nursing Home, have been exercising “managerial functions” within the meaning of section 1(3)(b) of the Act, and the Board finds them to be “employees” for the purposes of the Act. The Board does, however, draw to the parties’ attention the recent decision of the Board in *Windsor Western Hospital*, [1984] OLRB Rep. Nov. 1643, in connection with the union’s duty of “fair representation”, insofar as persons exercising limited supervisory functions may also come to hold positions of responsibility within the union.

9. The Board accordingly now certifies the applicant on a final basis as bargaining agent for all employees of the respondent in Aurora, Ontario, save and except Registered Nurses, Graduate Nurses, Supervisors and persons above the rank of Supervisor. For the sake of clarity, the Board notes that the term “Supervisor” does not include the Registered Nursing Assistants examined by the Board in the present application.

10. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0503-83-R: Carleton Roman Catholic Separate School Board Employees' Association, (Applicant) v. Carleton Roman Catholic Separate School Board, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit: "all office and clerical employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors and persons above the rank of supervisor, secretary to the director of education, secretary to the superintendent of finance and administration, secretary to the manager of personnel, accountant, secretary, recording secretaries, benefit clerk, professional and paraprofessional staff, lunchroom supervisors, French second language monitors, teacher aides, students employed during the school vacation period, students employed on work experience programmes and persons covered by subsisting collective agreements." (53 employees in unit). (*Clarity Note*).

2957-83-R: Ontario Nurses' Association, (Applicant) v. St. Joseph's Home, (Respondent).

Unit: "all lay registered and graduate nurses employed in a nursing capacity by the respondent in Guelph, save and except nursing co-ordinator, persons above the rank of nursing co-ordinator, persons above the rank of nursing co-ordinator, and persons regularly employed for not more than twenty-four (24) hours per week." (4 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0816-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Westin Hotel, (Respondent).

Unit: "all stationary engineers and persons primarily engaged as their helpers employed by the respondent at its hotel in Ottawa, save and except Assistant Building Superintendent and persons above the rank of Assistant Building Superintendent." (11 employees in unit). (*Having regard to the agreement of the parties*).

0933-84-R: United Steelworkers of America, (Applicant) v. Northern Telecom Canada Limited, (Respondents) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Barrie, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31) employees in unit).

0938-84-R: Ontario Public Service Employees Union, (Applicant) v. The Children's Aid Society of the Regional Municipality of Waterloo, (Respondent).

Unit #1: "all office and clerical employees of the respondent in the Regional Municipality of Waterloo, save and except Executive Secretary, controller, supervisors, managers, and persons above the rank of supervisor and manager, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (68 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Waterloo, Ontario, save and except program co-ordinators, persons above the rank of program co-ordinator, controller, office and clerical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (68 employees in unit).

1147-84-R: Ontario Nurses' Association, (Applicant) v. Rainy River Valley Health Care Facilities, Inc., (Respondent).

Unit #1: (*See: Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Rainy River, Ontario, save and except the Nurse Administrator, persons above the rank of Nurse Administrator, and those persons regularly employed for not more than 24 hours per week." (1 employee in unit).

1198-84-R: Toronto Typographical Union, Local #91, (Applicant) v. Burlington Northern Air Freight Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Peel, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

1540-84-R: The Canadian Union of Public Employees, (Applicant) v. The Art Gallery of Windsor, (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except the director, the business manager, the assistant to the business manager, curators, secretary to the director, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (17 employees in unit). (*Clarity Note*).

1548-84-R: United Brotherhood of Carpenters' and Joiners of America, Local Union 1030, (Applicant) v. Elbertsen Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Kingston, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (33 employees in unit).

1554-84-R: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC, (Applicant) v. Perma Foam Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. (29 employees in unit). (*Having regard to the agreement of the parties*).

1629-84-R: The United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Nepean Roof Truss Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Nepean, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*).

1670-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit: "all employees of the respondent at its retail store at 3487 Lawrence Avenue East, Metropolitan Toronto, save and except Department Supervisors, persons above the rank of Department Supervisor, security staff management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and students employed on a co-operative programme with a school, college or university." (65 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1718-84-R: The International Brotherhood of Electrical Workers, Local Union 894, (Applicant) v. Morris Electric Limited, (Respondent).

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan) the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1755-84-R: Amalgamated Clothing & Textile Workers Union, (Applicant) v. Bonnie Stuart Shoes Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Kitchener, save and except foremen and foreladies, persons above the rank of foreman or forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (71 employees in unit).

1768-84-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. G. C. Romano Sons (Toronto) Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in that portion of the District of Algoma South of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1816-84-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (Applicant) v. Woodbridge Foam Corporation, (Respondent).

Unit: "all employees of the respondent in Woodbridge, Ontario, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (413 employees in unit).

1827-84-R: Service Employees Union, Local 210, (Applicant) v. The Religious Hospitallers of Hotel Dieu of St. Joseph of the Diocese of London in Ontario, (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario regularly employed for not more than twenty-four (24) hours per week save and except supervisors and foremen, persons above the rank of supervisor or foreman, professional medical staff, registered, graduate and under-graduate nurses, paramedical staff, under-graduate pharmacists and dieticians, pastoral visitors, electronic and mechanical maintenance personnel, office staff, chief engineer and persons covered by subsisting collective

agreements.” (66 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1847-84-R: The Association of Canadian Film Craftspeople, (Applicant) v. Canadian Filmmakers Distribution Centre, (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except administrator, persons above the rank of administrator, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

1848-84-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the County of Lambton, (Respondent).

Unit: “all office, clerical and technical employees of the respondent in the County Administration Building at Wyoming, save and except Department Heads, persons above the rank of Department Head, County Engineer, Senior Finance Officer, Senior Payroll Clerk, Secretary to the County Clerk, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (29 employees in unit). (*Having regard to the agreement of the parties*).

1850-84-R: Retail, Wholesale and Department Store Union, (Applicant) v. Trans Canada Glass Ltd., (Respondent).

Unit: “all employees of the respondent employed at its warehouse in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, dispatchers, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (15 employees in unit). (*Having regard to the agreement of the parties*).

1853-84-R: Canadian Union of Public Employees, (Applicant) v. Town of Newmarket Public Library Board, (Respondent).

Unit: “all employees of the respondent in Newmarket, Ontario regularly employed for not more than twenty-four (24) hours per week save and except Chief Librarian, Adult Services Librarian, Children’s Services Librarian, Audiovisual Technician, Circulation Technician, Special Assistant to the Chief Librarian, Secretary/Bookkeeper and persons covered by subsisting Collective Agreements.” (6 employees in unit). (*Having regard to the agreement of the parties*).

1857-84-R: Sheet Metal Workers’ International Association Local Union 537, (Applicant) v. Richardson Brothers Insulation Company Limited, (Respondent) v. International Association of Heat and Frost Insulators & Asbestos Workers, Local 95, (Intervener).

Unit #1: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1877-84-R: Retail, Wholesale and Department Store Union, (Applicant) v. Slade & Stewart Ltd. (d.b.a. Gamble Robinson), (Respondent).

Unit: “all office and clerical employees of the respondent at Sturgeon Falls, save and except office manager, persons above the rank of office manager, secretary to the manager, sales staff and students

employed during the school vacation period.” (4 employees in unit). (*Having regard to the agreement of the parties*).

1884-84-R: Labourers’ International Union of North America, Local 597, (Applicant) v. San Lee Construction, (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering) the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

1911-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 91, (Applicant) v. Oshawa Holdings Limited, (Respondent).

Unit: “all employees of the respondent at its Hickeson-Langs Supply Company Division in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (10 employees in unit). (*Having regard to the agreement of the parties*).

1912-84-R: Canadian Union of Public Employees, (Applicant) v. Hawkesbury Villa, (Respondent).

Unit #1: “all employees of the respondent in Hawkesbury, Ontario, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered graduate and undergraduate nurses, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (25 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: “all employees of the respondent in Hawkesbury, Ontario, employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered graduate and undergraduate nurses.” (14 employees in unit). (*Having regard to the agreement of the parties*).

1915-84-R: Hotel Employees and Restaurant Employees Union, Local 604, AFL, CIO, CLC, (Applicant) v. 485224 Ontario Limited c.o.b. as Queen’s Tavern, (Respondent).

Unit: “all waiters, waitresses, bartenders and tapmen of the respondent at Queen’s Tavern, at Peterborough, Ontario, regularly employed for not more than eighteen (18) hours per week, save and except assistant manager, persons above the rank of assistant manager, owners and up to a maximum of two (2) family members defined as father, mother, wife, husband, brother sister, son or daughter.” (5 employees in unit).

1917-84-R: International Brotherhood of Electrical Workers, (Applicant) v. Major Electrical Contractors Ltd., (Respondent).

Unit #1: “all electricians and electricians’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

Unit #2: “all electricians and electricians’ apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (8 employees in unit).

1920-84-R: United Steelworkers of America, (Applicant) v. Hostmann-Steinberg (Canada) Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (12 employees in unit).

1939-84-R: Ironworkers District Council of Ontario, (Applicant) v. Staats Steeplejacks, (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit)

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1940-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant) v. Asotina Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1949-84-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Work Wear Corporation of Canada Ltd., (Respondent).

Unit: "all employees of the respondent at Belleville, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons covered by subsisting collective agreements." (5 employees in unit).

1952-84-R: Labourers' International Union of North America Local 607, (Applicant) v. Columbia Reservoir Systems Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in unit).

1955-84-R: Canadian Union of Public Employees, (Applicant) v. Saga Canadian Management Services Limited, (Respondent).

Unit: "all employees of the respondent in the Bell Northern Research Buildings in Ottawa at 3500 Carling Avenue and 1400 Merivale Road save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

1962-84-R: Service Employees Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The Etobicoke General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener #1) v. Canadian Union of Operating Engineers and General Workers, (Intervener #2).

Unit: "all office and clerical employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, secretaries to the administrator, associate administrator, assistant administrator finance, assistant administrator human resources, assistant administrator professional services, assistant administrator patient services, assistant administrator materials and property, director of personnel, and medical advisory committee, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (187 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1968-84-R: International Molders & Allied Workers Union, (Applicant) v. Timberjack Inc., (Respondent).

Unit: "all employees of the respondent at its Julianna Drive facility in Woodstock, Ontario, save and except foremen, persons above the rank of foreman, outside servicemen, office and sales staff." (13 employees in unit). (*Having regard to the agreement of the parties*).

1973-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant) v. Traugott Construction Ltd., (Respondent) v. Labourers International Union of North America, Local 1081, (Intervener).

Unit: "all carpenters and carpenters' apprentices employed by the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township) excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman and persons covered by the subsisting collective agreement between the respondent and Labourers International Union of North America, Local 1081." (7 employees in unit).

1974-84-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Tri-Sure Products Ltd., (Respondent).

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (27 employees in unit). (*Having regard to the agreement of the parties*).

1987-84-R: Aluminum, Brick and Glass Workers International Union, AFL-CIO-CLC, (Applicant) v. BMI Refractories Inc., (Respondent).

Unit: "all employees of the respondent at Smithville, Ontario, save and except foremen, those above the rank of foreman, office, clerical, technical and sales staff, refractory installation personnel and students employed during the school vacation period." (20 employees in unit). (*Having regard to the agreement of the parties*).

1995-84-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Ontario Motor League — Ottawa Club, (Respondent).

Unit: "all dependent contractors providing vehicle services to members of the Ontario Motor League — Ottawa Club and affiliated members of the Ontario Motor League operating within the Regional Municipality of Ottawa-Carleton." (10 employees in unit). (*Having regard to the agreement of the parties*).

1999-84-R: Ontario Nurses' Association, (Applicant) v. York-Finch General Hospital, (Respondent) v. Canadian Union of Operating Engineers and General Workers Local 101, (Intervener).

Unit: "all registered and graduate nurses regularly employed in a nursing capacity by the respondent in Metropolitan Toronto for not more than 24 hours per week save and except unit supervisors, persons above the rank of unit supervisor, the quality assurance co-ordinator, the employee health co-ordinator, the staff training and development co-ordinator." (27 employees in unit). (*Having regard to the agreement of the parties*).

2007-84-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, (Applicant) v. Canfarge Ltd., (Respondent).

Unit: "all employees of the Permanent Concrete Division of the respondent at its Ready Mix Plant in Brockville, Ontario, save and except foremen, persons above the rank of foreman, security, office, clerical and sales staff." (9 employees in unit). (*Having regard to the agreement of the parties*).

2021-84-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Tricil (Sarnia) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Mississauga, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

2023-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. The John Hayman & Sons Company Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2024-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Bob Hendricksen Construction Ltd., (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

2032-84-R: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, (Applicant) v. 553501 Ontario Limited o/a Ponte Bros. Limited, (Respondent).

Unit: "all bricklayers, bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2038-84-R: Hotel Employees and Restaurant Employees Union Local 75, (Applicant) v. Crawley and McCracken Company Limited, (Respondent).

Unit: "all employees of the respondent in the Township of Marathon, Ontario, save and except supervisors, persons above the rank of supervisor, sales and office staff." (9 employees in unit). (*Having regard to the agreement of the parties*).

2044-84-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 463, (Applicant) v. Lanewood Corp., (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all plumbers', plumbers apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan) the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

2062-84-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of the North Shore, (Respondent).

Unit #1: "all employees of the respondent in the Township of North Shore, Ontario, save and except superintendents, persons above the rank of superintendent, office, clerical and technical staff and persons regularly employed for not more than twenty-four (24) hours per week." (7 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all office, clerical and technical staff of the respondent in the Township of North Shore, Ontario, save and except the deputy clerk treasurer, persons above the rank of deputy clerk treasurer and recreation director." (4 employees in unit). (*Having regard to the agreement of the parties*).

2063-84-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. D.C.C. Investments Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices, in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

2074-84-R: Health, Office & Professional Employees, a division of Local 206 United Food & Commercial Workers, chartered by the United Food & Commercial Workers International Union, (Applicant) v. Brewer's Nursing Home, (Respondent).

Unit: "all registered and graduate nurses of the respondent in the Township of South Marysburgh in the County of Prince Edward, save and except supervisors, persons above the rank of supervisor, Director of Nursing, office and clerical staff and persons covered by a subsisting collective agreement." (2 employees in unit). (*Having regard to the agreement of the parties*).

2116-84-R: United Plant Guard Workers of America, Local 1958, (Applicant) v. The Art Gallery of Windsor, (Respondent).

Unit: "all security guards employed by the respondent in Windsor, Ontario, save and except persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*).

2123-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. S. McNally & Sons Limited, (Respondent).

Unit: "all employees of the respondent at Hamilton, save and except foremen, persons above the rank of foreman, office and clerical staff, production employees, labourers, and those employees covered by subsisting collective agreements." (6 employees in unit). (*Having regard to the agreement of the parties*).

2124-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Fyfe Transportation & Services Ltd., (Respondent).

Unit: "all employees of the respondent at St. Catharines, Ontario, save and except foremen, those above the rank of foreman, office, clerical and sales staff." (20 employees in unit). (*Having regard to the agreement of the parties*).

2126-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Brink's Canada Limited, (Respondent).

Unit: "all employees of the respondent in Kitchener, Ontario, save and except supervisors, those above the rank of supervisor, automatic teller machine technicians, janitor, clerical, office and sales staff and persons covered by a subsisting collective agreement." (11 employees in unit). (*Having regard to the agreement of the parties*).

2150-84-R: Ironworkers District Council of Ontario, (Applicant) v. Ironmen Steel Erectors Inc., (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2155-84-R: Ontario Public Service Employees Union, (Applicant) v. The Norfolk Board of Education, (Respondent).

Unit: "all teacher aides employed by the respondent in the Regional Municipality of Haldimand Norfolk, save and except persons covered by subsisting collective agreements." (9 employees in unit).

2157-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Clarinda Developments Limited, (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2167-84-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. K-Bro Linen Systems Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

2177-84-R: The International Union of Bricklayers & Allied Crsftsmen Local Union #10, (Applicant) v. Camillo Santin Mason Contractor, (Respondent).

Unit #1: "all bricklayers, bricklayers' apprentices, stonemasons, stonemasons' apprentices, plasterers

and plasterers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all bricklayers, bricklayers' apprentices, stonemasons, stonemasons' apprentices, plasterers and plasterers' apprentices in the employ of the respondent in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2179-84-R: Service Employees International Union, Local 532 Affiliated with S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Flamboro Downs Holdings Limited, (Respondent).

Unit #1: "all office and clerical employees of the respondent at Flamboro Downs Racetrack at Dundas, Ontario, save and except office manager, persons above the rank of office manager, race operation personnel, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (2 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all office and clerical employees of the respondent at Flamboro Downs Racetrack at Dundas Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period in an office and clerical capacity, save and except office manager, persons above the rank of office manager, race operation personnel and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2185-84-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Consumers Distributing Company Limited, (Respondent).

Unit: "all employees of the respondent in its Toy City Distribution Centre at Oakville, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2201-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. W. Rourke Ltd., (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2216-84-R: Service Employees International Union, Local 204, affiliated with the S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Ina Grafton Gage Home, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except registered and graduate nurses, activity director, paramedical employees, supervisors, persons above the rank of supervisor, and office staff." (57 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2239-84-R: Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. G. Wakely Cartage Ltd., (Respondent).

Unit: "all employees of the respondent in Port Hope, Ontario, save and except foremen, those above the rank of foreman, clerical, office and sales staff, persons regularly employed for not more than

twenty-four (24) hours per week and students employed during the school vacation period.” (23 employees in unit). (*Having regard to the agreement of the parties*).

2261-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Lamco Construction Limited, (Respondent) v. The Ontario Provincial Council, the United Brotherhood of Carpenters and Joiners of America on its own behalf and on behalf of the United Brotherhood of Carpenters and Joiners of America, its affiliated bargaining agents, (Intervener).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all employees of the respondent in The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

2279-84-R: Labourers International Union of North America, Local 527, (Applicant) v. Ferano Construction L.T.D., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1653-84-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. St. Agatha's Children's Village Inc., (Respondent).

Unit: “all employees of the respondent in St. Agatha, Ontario, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (45 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of persons on list as originally prepared by employer		28
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		13

1922-84-R: The Canadian Union of Public Employees, (Applicant) v. North Bay Hospital Commission, (Respondent).

Unit: “all office and clerical employees of the Respondent in North Bay, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except Supervisors, persons above the rank of Supervisor, Medical Records Librarian, Secretaries to Executive Director, Assistant Executive Director, Director of Personnel, Director of Nursing,

Director of Finance, Personnel Clerk Typist and persons covered by subsisting collective agreements." (27 employees in unit).

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		6

1964-83-R: Service Employees International Union Local 532, A.F.L., C.I.O., C.L.C., (Applicant) v. Extendicare/Oakville, A Division of Crownx Inc. (Canadian Health Care Division), (Respondent).

Unit: "all employees of the respondent at Oakville regularly employed for not more than twenty-two and one-half (22-1/2) hours per week and students employed during the school vacation period, save and except registered nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, and persons covered by subsisting collective agreements." (69 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised list of employees		60
Number of persons who cast ballots	21	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		5

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1553-84-R: United Steelworkers of America, (Applicant) v. Almat Metal Ltd., (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of York, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in unit).

Number of persons on revised voters' list		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		4

1567-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Premium Forest Products Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (349 employees in unit). (*Having regard to the agreement of the unit*).

Number of names of persons on revised voters' list		352
Number of persons who cast ballots	327	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		222
Number of ballots marked against applicant		97
Number of ballots segregated and not counted		5

Applications for Certification Dismissed — No Vote Conducted

0860-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Eldon Excavating Ltd., (Respondent). (8 employees in unit).

1026-84-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Westeinde Construction Ltd., (Respondent). (27 employees in unit).

1141-84-R: United Food and Commercial Workers International Union, (Applicant) v. Paler Foods Inc., (Respondent) v. Canadian Union of Restaurant and Related Employees, Hotel Employees, Restaurant Employees Union, Local 88, AFL-CIO-CLC, and Canadian Union of Restaurant and Related Employees, (Intervenors) v. Group of Employees, (Objectors). (50 employees in unit). (*Dismissed*).

1652-84-R: Teamsters Union Local No. 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Brink's Canada Limited, (Respondent) v. Group of Employees, (Objectors). (7 employees in unit).

1699-84-R: International Union of Operating Engineers, Local 793, (Applicant) v. Malfara & Sons Excavating & Contracting, (Respondent) v. Group of Employees, (Objectors). (15 employees in unit).

1818-84-R: Association of Allied Health Professionals: Ontario, (Applicant) v. The Regional Municipality of Durham, (Respondent) v. The Canadian Union of Public Employees, (Intervener). (26 employees in unit).

1849-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent). (60 employees in unit).

1870-84-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters, Local 847 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Finished Woodfloor Ltd., (Respondent). (45 employees in unit).

1885-84-R: Sheet Metal Workers International Local 235 Representing the Sheet Metal Workers and Built Up Roofers and Waterproofers, (Applicant) v. Horizon Roofing Ltd., (Respondent). (18 employees in unit).

1950-84-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Rugged Air Systems Limited, (Respondent). (2 employees in unit).

2002-84-R: Amalgamated Transit Union, Local 1572, (Applicant) v. The Corporation of the City of Mississauga, Parks Department, (Respondent). (204 employees in unit).

2033-84-R: Ontario Public Service Employees Union, (Applicant) v. Pembroke and District Association for The Mentally Retarded, (Respondent) v. Group of Employees, (Objectors). (41 employees in unit).

2036-84-R: Canadian Textile & Chemical Union, (Applicant) v. Alros Products Ltd., Group of Employees, (Objectors). (109 employees in unit).

2072-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. K. B. M. Construction, (Respondent). (19 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1649-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Simpsons Limited, (Respondent).

Unit: "all employees of the respondent at its retail stores in Kitchener, Ontario, save and except department supervisors, persons above the rank of department supervisor, security staff management trainees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours

per week, students employed on a co-operative programme with a school, college or university." (96 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		93
Number of persons who cast ballots	87	
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		53

1689-84-R: Retail, Commercial & Industrial Union, Local 206 Chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO, (Applicant) v. Autotube Limited, (Respondent).

Unit: "all employees of the respondent at St. Mary's save and except lead hands, persons above the rank of lead hand, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (61 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		52
Number of persons who cast ballots	52	
Number of ballots marked in favour of applicant		23
Number of ballots marked against applicant		28
Ballots segregated and not counted		1

1874-84-R: International Molders & Allied Workers Union, (Applicant) v. Elgin Handles Limited, (Respondent).

Unit: "all employees of the respondent at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (77 employees in unit).

Number of names of persons on list as originally prepared by employer		75
Number of persons who cast ballots	74	
Number of ballots marked in favour of applicant		29
Number of ballots marked against applicant		44
Ballots segregated and not counted		1

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

0817-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Tryverse Products Ltd., c.o.b., as Lilo Products, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of Hamilton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		7
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		7

1147-84-R: Ontario Nurses' Association, (Applicant) v. Rainy River Valley Health Care Facilities, Inc., (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Rainy River, Ontario, save and except the Nurses Administrator, persons above the rank of Nurse Administrator, and those above the rank of Nurse Administrator, and those persons regularly employed for not more than 24 hours per week." (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots	0	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		0

Unit #2: (*See: Bargaining Agents Certified — No Vote Conducted*).

1872-84-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC., (Applicant) v. Hudson's Bay Company, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its Hudson's Bay Wholesale Division at 100 Shorting Road in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (48 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		47
Number of persons who cast ballots	45	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		30
Ballots segregated and not counted		2

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1276-84-R: Labourers' International Union of North America, Local 607, (Applicant) v. Lakeland Pipelines Limited, (Respondent).

1728-84-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Charterways Transportation Limited School Bus Division, (Respondent).

1801-84-R: Labourers International Union of North America, Local 607, (Applicant) v. Scofan Contractors Limited, (Respondent).

1817-84-R: Service Employees Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Plainfield Children's Home, (Respondent).

1828-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Prescott Homes Ltd., (Respondent).

1851-84-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Satin Finish Hardwood Flooring (Ontario) Limited, Satin Finish Hardwood Flooring Limited, (Respondent).

1923-84-R: The Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of North Bay, (Respondent).

1993-84-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Alwell Forming London Limited, (Respondents).

1998-84-R: Toronto-Central Ontario Building and Construction Trades Council, (Applicant) v. The Board of Education for the City of Toronto, (Respondent) v. International Association of Machinists and Aerospace Workers, (Intervener).

2010-84-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. S. McNally & Sons Limited, (Respondent).

2100-84-R: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Applicant) v. Winco Restaurants Limited, (Respondent).

2162-84-R: Energy and Chemical Workers Union, (Applicant) v. Provincial Gas Company, (Respondent).

2262-84-R: Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Westland Construction Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1449-83-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. David Yan & Partner of Canada Limited and David Yan Construction Ltd., (Respondents). (*Granted*).

0031-84-R: The International Brotherhood of Painters and Allied Trades, Local 1795, (Applicant) v. Aerlock Industries Limited & Aeroloc Aluminum Products, (Respondents).

Unit: "all glaziers and glaziers' apprentices in the employ of Aerlock Industries Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (*Dismissed*).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant, the affiliated bargaining agent the International Brotherhood of Painters and Allied Trades, Local 1795, of the Employee Bargaining Agency the International Brotherhood of Painters and Allied Trades and the Ontario Council of the Industrial Brotherhood of Painters and Allied Trades		0
Number of ballots marked against applicant (above)		8

1094-84-R: United Steelworkers of America, (Applicant) v. Northern Telecom Canada Limited and/or Hawk Labour Supply Limited, (Respondents). (*Granted*).

1779-84-R: Carpenters' District Council of Toronto and Vicinity on behalf of Local 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. AWL consultants Inc. and Teal Interiors, a division of 451630 Ontario Limited, (Respondents). (*Granted*).

SALE OF A BUSINESS

0032-84-R: The International Brotherhood of Painters and Allied Trades, Local 1795, (Applicant) v. Aerloc Industries Limited, Aerloc Aluminum Products and Jay Bee Installation Services, (Respondents).

Unit: "all glaziers and glaziers' apprentices in the employ of Aerloc Industries Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (*Dismissed*).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant, the affiliated bargaining agent the International Brotherhood of Painters and Allied Trades, Local 1795, of the Employee Bargaining Agency the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades		0
Number of ballots marked against applicant (above)		8

1269-84-R: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Domizio Electric Ltd. and Domizio Electric Ltd. and 418041 Ontario Ltd. carrying on business under the registered name and style of Dom-Mar Electric and 514421 Ontario Limited carrying on business under the registered name and style of Profile Electric and Dom-Mar Electric Ltd., (Respondent). (*Granted*).

UNION SUCCESSOR RIGHTS

1645-84-R: Local 2380, Canadian Union of Public Employees, (Applicant) v. The Corporation of the City of Barrie, The Barrie Public Library Board and The Corporation of the Township of Innisfil, (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0752-84-R: John Sinnamon on his own behalf and on the behalf of all other employees of United Plastic Components Limited, (Applicant) v. The United Brotherhood of Carpenters and Joiners of America, Local 3054, (Respondent) v. United Plastic Components Ltd., (Intervener).

Unit: "all employees of the intervener employed at Exeter, Ontario, save and except foremen, persons above that rank, security guards, summer students, office and sales staff." (16 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		13
Number of persons who cast ballots	10	
Number of ballots marked in favour of respondent		3
Number of ballots marked against respondent		6

1137-84-R: Ruth Bird, on behalf of a Group of Employees of D'Alliard's Store's 40 & 47 of Kitchener

Ontario, (Applicant) v. United Food & Commercial Workers Union Local 206, Chartered by the United Food & Commercial Workers International Union, (Respondent) v. D'Alliard's, Division Marks and Spencer Canada Inc., (Intervener).

Unit: "all its part-time employees working at its retail store in the Regional Municipality of Waterloo regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except managers and persons above the rank of manager." (13 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		9

1256-84-R: Julian Tullett, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent) v. Bramalea Limited, (Intervener).

Unit: "all employees of Bramalea Limited engaged in cleaning and maintenance including resident superintendents, at 10 Kensington Road, 15 Eastbourne Drive, 37 Eastbourne Drive, 9 Lisa Road, 10 Lisa Road, 11 Lisa Road, 790 Clark Boulevard, 3 Knightsbridge Road, 11 Knightsbridge Road, 2 Silver Maple Court, 4 Silver Maple Court, 6 Silver Maple Court, 8 Silver Maple Court, 5 Kings Cross Road and 15 Balmoral Drive in the City of Brampton, save and except property manager and persons above the rank of property manager, and students employed during the school vacation period." (55 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		54
Number of persons who cast ballots	54	
Number of ballots marked in favour of respondent		12
Number of ballots marked against respondent		42

1291-84-R: Registered Nurses employed by General Motors of Canada Ltd., St. Catharines plants, members of Local 129, O.N.A., (Applicant) v. Ontario Nurses' Association, (Respondent) v. General Motors of Canada Limited, (Intervener).

Unit: "all registered and graduate nurses employed by the intervener, General Motors of Canada Limited, at St. Catharines, Ontario, in a nursing capacity save and except Supervisor — remedial and persons above the rank of supervisor, save and except L. Gionet and M. Marks." (11 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		5

1372-84-R: Helmut Schwinghammer, (Applicant) v. Painter's Local 1494 (International Brotherhood of Painters and Allied Trades), (Respondent).

Unit: "all painters and painters apprentices employed by Roy & Huebert Limited in Essex and Kent Counties." (1 employee in unit). (*Granted*).

Number of names of persons on revised voters' list		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

1373-84-R: Nancy Sadler, (Applicant) v. Local 280 Bartenders and Beverage Dispensers' of H.E.R.E.

International Union, (Respondent) v. Olga's Tavern (formerly known as Tusco Public House), (Intervener).

Unit: "all full-time and part-time male and female employees employed in the beverage department in Olga's Tavern at 235 Jarvis Street, Toronto, Ontario as tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar-boys and improvers and any other new classification relating to the serving of alcoholic beverages." (6 employees in unit). (*Granted*).

Number of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

1377-84-R: Gail Sadava as representative for the employees of Commercial Career Schools Limited, (Applicant) v. Christian Labour Association of Canada, (Respondent) v. Commercial Career Schools Limited, (Intervener).

Unit: "all employees of the intervener at Welland and St. Catharines, save and except admissions officers, principals, persons above the rank of principal, office clerical, custodial and maintenance staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (9 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		7

1383-84-R: Employees of all Boys and Girls Clubs, in Ottawa-Carleton, (Applicant) v. Canadian Union of Public Employees, (Respondent) v. Boys and Girls Club of Ottawa-Carleton, (Intervener).

Unit: "all employees of the Boys and Girls Club of Ottawa-Carleton at Ottawa, save and except unit managers, maintenance superintendent, persons above the rank of unit manager and maintenance superintendent, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of respondent		3
Number of ballots marked against respondent		9

1384-84-R: Nancy Anne Hamer, (Applicant) v. Hotel Employees and Restaurant Employees Local 604, AFL, CLC, CIO, (Respondent) v. G. William Ryder, (Intervener #1) v. Marguerite R. Ryder, (Intervener #2).

Unit: "all waiters, bartenders and tapmen employed in the beverage rooms of the New Windsor Hotel (Pig's Ear Tavern at Peterborough, Ontario, save and except assistant manager, persons above the rank of assistant manager and persons regularly employed for not more than fourteen (14) hours per week." (4 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		4

1428-84-R: Margaret Sexsmith, (Applicant) v. Retail, Commercial & Industrial Union, Local 206, (Respondent) v. Peterborough Bearings Limited, (Intervener). (1 employee in unit). (*Granted*).

1464-84-R: Jane Conlon, (Applicant) v. Amalgamated Clothing and Textile Workers Union, Local 1886, (Respondent) v. Perth Yarns Limited, (Intervener).

Unit: "all employees of Perth Yarns Limited at its plant in Perth, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, stationary engineers, dyehouse laboratory and drug room staff, mill testing office staff, retail store staff, and students employed during the school vacation period." (111 employees in unit). (*Granted*).

Number of names of persons on revised voters' list	99
Number of persons who cast ballots	84
Number of ballots marked in favour of respondent	35
Number of ballots marked against respondent	49

1693-84-R: James Wreaks, Joseph Arruda, Robert Brazier, Lanny Brazier, Marjorie Bond and Dean Dunham, (Applicants) v. Christian Labour Association of Canada, (Respondent) v. United Springs Limited, (Intervener). (6 employees in unit). (*Withdrawn*).

2372-84-R; 2373-84-R: Gibco Canada Inc., (Applicant) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Respondent). (4 employees in unit). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

0136-84-M: The Corporation of the County of Middlesex (Strathmere Lodge), (Employer) v. London & District Service Workers Union, Local 220, (Trade Union). (*Terminated*).

1676-84-M: Old Mill Restaurant (Old Mill Investments), (Employer) v. Hotel Employees Restaurant Employees Union, Local 75, (Trade Union). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1614-84-U: Primus Masonry Ltd., (Applicant) v. Bricklayers, Masons Independent Union of Canada; Frank Grisolia; Otello Ongara; and John Meiorin, (Respondents). (*Granted*).

2289-84-U: McKay-Cocker Construction Limited; Ellis-Don Ltd., (Applicants) v. Carl D. Buck, Don Tuckwood, (Respondents). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0346-83-U: Ontario Sheet Metal and Air Handling Group, (Complainant) v. Acme Plumbing and Heating, (Respondent). (*Withdrawn*).

0559-83-U: Canadian Union of Public Employees, (Complainant) v. Boys and Girls Club of Ottawa-Carleton, (Respondent). (*Dismissed*).

1950-83-U: John J. Harkin, (Complainant) v. Canadian Union of United brewery Flour Cereal Soft Drink, Distillery Workers CLC Local 325, Etobicoke, (Respondent) v. Carling O'Keefe Breweries of Canada Limited, (Intervener). (*Withdrawn*).

2287-83-U: Ansia Mordowanec, (Complainant) v. Ontario Nurses' Association and Windsor Western Hospital (Riverview Unit), (Respondents). (*Granted*).

2526-83-U: Ontario Nurses' Association, (Complainant) v. Windsor Western Hospital (Riverview Unit), (Respondent). (*Granted*).

2906-83-U: Glen J. Dunn, (Complainant) v. H. J. Heinz Company of Canada, United Food and Commercial Workers, Local P459, (Respondents). (*Withdrawn*).

2940-83-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and its Local 397, (Complainant) v. Crown Mfg. Inc., (Respondent). (*Dismissed*).

2944-83-U: United Food and Commercial Workers International Union AFL-CIO-CLC, (Complainant) v. Krinos Foods Canada Ltd., (Respondent). (*Granted in Part*).

3094-83-U: Richard Victor Van Derlip, (Complainant) v. Ontario Hydro Employees' Union Local 1000, (Respondent) v. Ontario Hydro, (Intervener). (*Dismissed*).

0314-84-U: Sandra Hall, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) and its Local 1421 and Smith & Stone (1982) Inc., (Respondents). (*Dismissed*).

0424-84-U: Redvers C. Butler, (Complainant) v. Inco Limited, (Respondent). (*Dismissed*).

0479-84-U: Metropolitan Toronto Sewer & Watermain Contractors Association, (Complainant) v. Con-Drain Co. Ltd., (Respondent). (*Withdrawn*).

0620-84-U: Southern Ontario Newspaper Guild, (Complainant) v. Toronto Star Newspapers Ltd., (Respondent). (*Withdrawn*).

0849-84-U: Ljilja Flanjak, (Complainant) v. Local 310, Amalgamated Clothing & Textile Workers Union, AFL, CIO, CLC, and Greb Industries, A Division of Warrington Inc., (Respondent). (*Withdrawn*).

0865-84-U: Hotel Employees, Restaurant Employees Union, Local 75, (Complainant) v. Elias Brothers Restaurants of Canada Limited, (Respondent). (*Withdrawn*).

0965-84-U(F): Ontario Public Service Employees Union, (Complainant) v. Participating Hospitals Listed in Schedule "A", (Respondents). (*Withdrawn*).

0998-84-U: Service Employees Union, Local 204, A.F.L.-C.I.O.-C.L.C., (Complainant) v. Christie Street Senior Residences Inc., (Respondent). (*Withdrawn*).

1044-84-U: United Steelworkers of America, (Complainant) v. Northern Telecom Canada Limited and/or Hawk Labour Supply Limited, (Respondents). (*Withdrawn*).

1111-84-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Dufresne Piling Co. (1967) Ltd., (Respondent). (*Withdrawn*).

1183-84-U: Cameron Douglas Wonch, (Complainant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Dismissed*).

1194-84-U: Labourers' International Union of North America, Local 183, (Complainant) v. Canada's Capital Building Services Limited, (Respondent). (*Withdrawn*).

1203-84-U: United Steelworkers of America, (Complainant) v. John Ewing & Co. Inc., (Respondent). (*Withdrawn*).

1236-84-U: The Ontario Public Service Employees Union, (Complainant) v. The Family and Children's Services of Renfrew County and the City of Pembroke, (Respondent). (*Withdrawn*).

1255-84-U: Eleanor Thibodeau, (Complainant) v. Ontario Nurses' Association, (Respondent). (*Dismissed*).

1368-84-U: Service Employees' Union, Local 204, affiliated with A.F.L.-C.I.O.-C.L.C., (Complainant) v. Medi Park Lodges Inc., carrying on business as Grace Abbey Nursing Home and Medi Park Lodges Inc. carrying on business as Valley Park Nursing Home, (Respondent). (*Withdrawn*).

1397-84-U: The United Brotherhood of Carpenters and Joiners of America, General Workers Union, Local 1030, (Complainant) v. F. Leblond Cement Products Limited, (Respondent). (*Granted*).

1399-84-U: Kazik Pawlak, (Complainant) v. Tom Cope, Local Union 1151, Millwrights, United Brotherhood of Carpenters and Joiners of America and Millwright District Council of Ontario, (Respondents). (*Dismissed*).

1413-84-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Dufresne Piling Co. (1967) Ltd., (Respondent). (*Withdrawn*).

1425-84-U: Labourers' International Union of North America, Local 607, (Complainant) v. Lakeland Pipelines Limited, (Respondent). (*Withdrawn*).

1441-84-U: United Steelworkers of America, on behalf of its Local Union 8754, (Complainant) v. Alcan Canada Products Limited, (Respondent). (*Withdrawn*).

1529-84-U: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Complainant) v. Standard Insulation Ltd., (Respondent). (*Granted*).

1542-84-U: Reuben Johnson, (Complainant) v. United Electrical, Radio and Machine Workers of Canada (UE) (Travailleurs Unis de l'Electricite, Radio et Machinerie du Canada (TUE), (Respondent). (*Dismissed*).

1562-84-U: International Union of Elevator Constructors, Local 90, (Complainant) v. Delta Elevator Limited, (Respondent). (*Withdrawn*).

1615-84-U: United Steelworkers of America, (Complainant) v. Almat Metal Ltd., (Respondent). (*Withdrawn*).

1623-84-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Armco Foods Limited, (Respondent). (*Withdrawn*).

1644-84-U: Paolo Osti, (Complainant) v. Labourers' International Union of North America, (Local 183), (Respondent). (*Dismissed*).

1658-84-U: Daniel Huider, (Complainant) v. United Automobile Workers of America, (Respondent) v. General Motors of Canada Limited, (Intervener). (*Withdrawn*).

1659-84-U: Ralph Albrecht, (Complainant) v. Labourers International Union, Local 607, (Respondent). (*Dismissed*).

1664-94-U: Bricklayers, Masons Independent Union of Canada Local 1, (Complainant) v. Primus Masonry Ltd. and Tony Rizzo, (Respondents). (*Withdrawn*).

1672-84-U: Labourers' International Union of North America, Local 607, (Complainant) v. Lakeland Pipelines Limited, (Respondent). (*Withdrawn*).

1773-84-U: Amalgamated Clothing and Textile Workers Union AFL-CIO-CLC, (Complainant) v. Perma Foam Ltd., (Respondent). (*Withdrawn*).

1783-84-U: International Union of Operating Engineers, Local 796, (Complainant) v. St. Jacques Nursing Home, (Respondent). (*Withdrawn*).

1784-84-U: Scott Larkin, (Complainant) v. United Auto Workers, (Respondent). (*Withdrawn*).

1791-84-U: Joseph Harte, (Complainant) v. Jointly (Steel Company of Canada and United Steel Workers of America, Local 1005), (Respondent). (*Withdrawn*).

1797-84-U: The Canadian Union of Public Employees, (Complainant) v. The Association of Community Centres of the City of Toronto, The City of Toronto, Cecil Street Community Centre, Central Eglinton Community Centre, Cowan Avenue Firehall, Scadding Court Community Centre, Ralph Thornton Community Centre, The 519 Church Street Community Centre, Community Centre 55, and Applegrove Community Complex, (Respondents). (*Withdrawn*).

1802-84-U: London and District Service Workers' Union, Local 220, (Complainant) v. Norfolk Hal-dimand Regional Nursing Home (Port Dover), (Respondent). (*Withdrawn*).

1811-84-U: United Food & Commercial Workers International Union, AFL-CIO-CLC, (Complainant) v. Franz Foods Limited, (Respondent). (*Withdrawn*).

1820-84-U: Bertrand Jette, (Complainant) v. Canadian Union of Public Employees, and its Local 1266, (Respondent). (*Withdrawn*).

1821-84-U: Bertrand Jette, (Complainant) v. Prescott-Russell County Board of Education and Georges Chartrand, (Respondent). (*Withdrawn*).

1824-84-U: Rod Couruoisier, (Complainant) v. Labourers' Union Local 126, President (Rod MacPherson), (Respondent). (*Withdrawn*).

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1859-84-U: Canadian Union of Public Employees, Local 1483, (Complainant) v. Dufferin-Peel Roman Catholic Separate School Board, (Respondent). (*Withdrawn*).

1865-84-U: Donald M. Peterkin et al, (Complainants) v. Local Union 71 Ottawa The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, (Respondent). (*Withdrawn*).

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1905-84-U: Retail, Wholesale and Department Store Union, AFL: CIO: CLC:, (Complainant) v. Crosstown Department Stores, (Respondent). (*Withdrawn*).

1918-84-U: The International Brotherhood of Electrical Workers' Local Union 894, on behalf of Pat McLean, Rene Bullee, Dan Kelly, Jeff Buchan and Mike O'Rourke, (Complainants) v. Morris Electric Ltd., (Respondent). (*Withdrawn*).

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1945-84-U: Gary Arthur Klaus Ullrich, (Complainants) v. Canadian Union of Public Employees (C.U.P.E.) Local #3, (Respondent). (*Withdrawn*).

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2131-84-U: Derek Gillingham, (Complainant) v. The Archer Greene Printing Group Inc., (Respondent). (*Withdrawn*).

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2092-84-M: V.I.P. Hotels Limited c.o.b. as The Sutton Place Hotel, (Employer) v. Hotel Employees

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2187-84-M: Four Seasons Hotels Limited, (Employer) v. Hotels, Clubs, Restaurants, Tavern Employees Union — Local 261, Ottawa affiliated with the A.F.L. C.I.O. and C.L.C., (Trade Union). (*Granted*).

2189-84-M: Delta Hotels Limited, Operating Delta Ottawa, (Employer) v. Hotels, Clubs, Restaurants, Tavern Employees Union — Local 261, Ottawa, affiliated with the A.F.L. C.I.O. C.L.C., (Trade Union). (*Granted*).

2190-84-M: Lord Elgin Hotel Limited of Ottawa, (Employer) v. Hotels, Clubs, Restaurants, Tavern Employees Union — Local 261, Ottawa affiliated with the A.F.L., C.I.O., and C.L.C., (Trade Union). (*Granted*).

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1634-84-M: Canadian Union of Public Employees, Local 1074, (Applicant) v. Teck Pioneer Residence, (Respondent). (*Withdrawn*).

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1545-84-OH: W. Douglas Pratt, (Complainant) v. Dalvin Hastings (Owner-Operator — Ortweid Asphalt Paving Ltd.), (Respondent). (*Withdrawn*).

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0351-84-M: The International Brotherhood of Painters and Allied Trades, Local 1795, (Applicant) v. Aerloc Industries Limited & Aerloc Aluminum Products, (Respondent). (*Withdrawn*).

0710-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ontario Paving Company, (Respondent). (*Withdrawn*).

1069-84-M: United Brotherhood of Carpenters and Joiners of America, Local 1988, (Applicant) v. Burchell Supply Limited, (Respondent). (*Withdrawn*),

1166-84-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. The Pipeline Contractors Association of Canada and R. L. Coolsaet of Canada Limited, (Respondents). (*Withdrawn*).

1465-84-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Complainant) v. Standard Insulation Ltd., (Respondent). (*Granted*).

1481-84-M: Labourers' International Union of North America, Local 506, (Applicant) v. Toronto Construction Association Vallentine Enterprises Contracting, (Respondent). (*Withdrawn*).

1500-84-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. McKay Cocker Construction Limited, (Respondent). (*Withdrawn*).

1533-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Valentine Enterprises Contracting, (Respondent). (*Withdrawn*).

1611-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. AWL Consultants Inc., (Respondent). (*Granted*).

1639-84-M: United Brotherhood of Carpenters & Joiners of America, Local 18, (Applicant) v. Keith Helm carrying on business as Duet Interior Systems, (Respondent). (*Granted*).

1641-84-M: Hotels, Clubs, Restaurants and Tavern Employees Union, Local 261, (Applicant) v. The Mill Dining Lounge, (Respondent). (*Withdrawn*).

1686-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Thornber & Son Mechanical Contractors Ltd., (Respondent). (*Granted*).

1752-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. De Luca & Mascarini Masonry Contractors Limited, (Respondent). (*Withdrawn*).

1753-84-M: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Village Contractors, (Respondent). (*Withdrawn*).

1754-84-M: International Union of Bricklayers and Allied Craftsmen, Local 2, (Applicant) v. Region Masonry (1981) Limited, (Respondent). (*Withdrawn*).

1756-84-M: Labourers' International Union of North America, Local 1059 and Ontario Allied Construction Trades Council, (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro, (Respondent). (*Withdrawn*).

1805-84-M: Resilient Floorworkers' Local Union 2965 (United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aldershot Flooring Ltd., (Respondent). (*Withdrawn*).

1841-84-M: Primus Masonry Limited, (Applicant) v. Bricklayers, Masons Independent Union of Canada; Frank Grisolia; Otello Ongaro and John Meiorin, (Respondents). (*Withdrawn*).

1860-84-M: Laborers' International Union of North America, Local 607, (Applicant) v. Shaefer — Townsend Limited, (Respondent). (*Withdrawn*).

1891-84-M: Resilient Floorworkers, Local Union 2965, (Applicant) v. Aldershot Flooring Limited, (Respondent). (*Withdrawn*).

1907-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Advance Cooling Systems, (Respondent). (*Withdrawn*).

1908-84-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 759, (Applicant) v. Overland Steel, (Respondent). (*Granted*).

1926-84-M: United Brotherhood of Carpenters & Joiners of America, Local #494, (Applicant) v. Ambassador Marble-Tile & Carpets Ltd., (Respondent). (*Granted*).

1927-84-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. City Acoustics Ltd., (Respondent). (*Granted*).

1929-84-M: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598, (Applicant) v. Insulation Thermo Comfort Inc., (Respondent). (*Withdrawn*).

1956-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Linrin Forming Limited, (Respondent). (*Granted*).

1957-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Brymac Limited, (Respondent). (*Withdrawn*).

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1977-84-M: International Brotherhood of Electrical Workers, Local 353, (Applicant) v. Domizio Electric Ltd., 418041 Ontario Ltd., Domizio Electric Limited and 418041 Ontario Ltd., carrying on business as Dom-Mar Electric, 514421 Ontario, Ltd., carrying on business as Profile Electric and Dom-Mar Electric Ltd., Respondents). (*Granted*).

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2012-84-M: Labourers' International Union of North America, Local 506, (Applicant) v. The Toronto Construction Association Umacs Construction Limited, (Respondent). (*Withdrawn*).

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2022-84-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting

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2026-84-M: Lin-Dall Excavating Limited, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Withdrawn*).

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2081-84-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 759, (Applicant) v. Sentinal Steel Erectors Ltd., (Respondent). (*Withdrawn*).

2082-84-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 759, (Applicant v. Intercity Welding & Fabricating Ltd., (Respondent). (*Granted*).

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2128-84-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 16 Hamilton, (Applicant) v. Continental Terrazzo and Marble Company Limited, (Respondent). (*Withdrawn*).

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*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778

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Annual Consolidated Index 1984



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A Monthly Series of Decisions from the
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Annual Consolidated Index 1984

EDITOR: NIMAL V. DISSANAYAKE

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Typeset, Printed and Bound by Union Labour in Ontario



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POLISH ALLIANCE FRIENDLY SOCIETY OF CANADA, BRANCH NO. 19, SOCIAL CLUB; RE HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 75; RE GROUP OF EMPLOYEES (Feb.) 349

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MARLEY ROOF TILES LIMITED; RE UNITED STEELWORKERS OF AMERICA (Mar.) 511

Build-Up — Certification-Construction Industry — Practice and Procedure — Reconsideration — Notice of application and related Board material mailed to box number provided by union as respondent's address — Fact that mail collected from box only at infrequent intervals no excuse for not filing timely reply — Board not reconsidering certificate issued — Build-up claim in construction context failing even if timely reply filed

NORBEN INTERIOR DESIGN LTD.; RE CARPENTERS' UNION, LOCAL 2041 (June) 851

Certification — Bargaining Unit — Charges — Constitutional Law — Practice and Procedure — Whether salesmen paid solely by commission having distinct community of interest — Board not undertaking investigation into allegations of unlawful organizing tactics by union — Whether requirement to join or pay dues to union contrary to Charter — Whether information on objecting to certification contained in Form 6 inadequate

SIMPSON'S LIMITED; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION; RE GROUP OF EMPLOYEES (Sept.) 1255

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BEN BRUINSMA AND SONS LIMITED; RE CARPENTERS UNION, LOCAL 1256; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793; RE CONSTRUCTION WORKERS, LOCAL 53, CLAC (Mar.) 404

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AERO BLOCK AND PRECAST LTD., KAMET ENTERPRISES LTD. AND 541190 ONTARIO INC.; RE CARPENTERS UNION; RE FORM WORK COUNCIL OF ONTARIO; RE LABOURERS UNION, LOCAL 493 (Sept.) 1166

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- THUNDER BAY, CORPORATION OF THE CITY OF.; RE MAURI AHOKAS
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STANDARD PLUMBING, ALLAN LESLIE STEWART C.O.B. AS.; U.A. LOCAL 666 ON ITS OWN BEHALF AND ON BEHALF OF THE AFFILIATED BARGAINING AGENTS OF THE E.B.A. (Dec.) 1772

Certification — Constitutional Law — Practice and Procedure — Union filing applications simultaneously before Ontario and Canada Labour Boards — Parties unaware of new test to determine constitutional jurisdiction set out by Court of Appeal — Proceeding adjourned to permit parties to determine status of Canada Board hearing and consider impact of Court of Appeal decision — Union and employer association not representing employees or employers affected denied intervener status

ALPHA TAXI LTD.; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION; RE CANADIAN UNION OF OPERATING ENGINEERS AND GENERAL WORKERS, LOCAL 222; RE OTTAWA TAXI OWNERS AND BROKERS ASSOCIATION (Feb.) 165

Certification — Construction Industry — Practice and Procedure — Increase of number of employees subsequent to application date not basis for directing vote — Employees alleging they were not advised cards will be used to apply for certification — Not reason to direct vote where no employee filed petition — Indication that improved benefits would follow certification not misleading to require vote

CORNWALL GRAVEL COMPANY LIMITED; RE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 (Dec.) 1693

Certification — Construction Industry — Practice and Procedure — Issue of whether work maintenance or construction arising in certification proceedings — Employee and employer bargaining agencies not entitled to notice — Designated employer bargaining agency not having legal and direct interest — Not entitled to be joined as party by intervention

ABITIBI — PRICE INC.; RE U.A., LOCAL 628; RE IBEW, LOCAL 1565; RE CANADIAN PAPERWORKERS UNION, LOCAL 67, 40, 32, 90, 109, 132, 133, 134, 239, 249; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, THUNDER BAY LODGE 1120 (Sept.) 1155

Certification — Employee — Employer — Construction Industry — Respondent operating squash club — Agreement with federal government providing subsidy for wages of unemployed persons hired under work program — Respondent hiring bricklayers under program to renovate and extend club — Whether employer in construction industry — Whether respondent, federal government or company managing project real employer

QUORUM INC.; RE LOCAL #1, ONTARIO — INTERNATIONAL UNION OF BRICKLAYERS' AND ALLIED CRAFTSMEN (Dec.) 1760

Certification — Membership Evidence — Natural Justice — Practice and Procedure — Reconsideration — Letter of withdrawal from membership sent to union with copy to Board — Board treating letter as petition and disregarding where objector failing to appear at hearing — No breach of natural justice — Employer not permitted to add to employee list after count announced at meeting with Board officer-Board not reconsidering certificate

T. EATON COMPANY LIMITED; RE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION; RE GROUP OF EMPLOYEES (July) 1015

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- UNLIMITED TEXTURES COMPANY LIMITED; RE U.A.W.; RE GROUP OF EMPLOYEES (Jan.) 138
- Certification — Membership Evidence — Practice and Procedure — Trade Union Status — Cards in International’s name but local named as applicant in error — Board consenting to name amendment — Adjourning hearing and reprocessing application in International’s name — Second form 9 filed on behalf of International — Not causing Board to refuse reliance on form 9 — UFCW International Union having status
- IMPERIAL FLAVOURS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS UNION; RE GROUP OF EMPLOYEES (May) 723
- Certification — Membership Evidence — Union raising collective agreement as bar to certification application required to establish entitlement to represent at time agreement entered into — Whether Board accepting certificate of membership of member in arrears of dues
- WARDET LIMITED; RE CARPENTERS UNION, LOCAL 446; RE LABOURERS’ INTERNATIONAL UNION (Jan.) 153
- Certification — Petition — Employee stating personal opinion that plant will close if union successful — Referring to another plant which closed after unionization — At request of union supporter management giving permission for meeting during work hours for discussion of pros and cons of unionization — Management not present at meeting — Employer took neutral hands-off attitude — Petition voluntary
- AUTOTUBE LIMITED; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; RE GROUP OF EMPLOYEES (Mar.) 400
- Certification — Petition — Employee who originated petition not testifying — Petition signed in presence of management and on company time using company resources — Employee perception of management involvement causing rejection of petition — Dissent of Board Member setting out guidelines for a valid petition
- MARKHAM HYDRO ELECTRIC COMMISSION; RE I.B.E.W., LOCAL 636; RE R. G. EWASIUK; RE GROUP OF EMPLOYEES (Oct.) 1481
- Certification — Petition — Practice and Procedure — Objectors claiming inadequate posting and opportunity to solicit support for petition — Seeking representation vote despite union support in excess of 55% — Absence of some employees from work unavoidable — Objectors not entitled to contact every employee at workplace — Extension of terminal date proper remedy even if posting inadequate
- RYERSON POLYTECHNICAL INSTITUTE, BOARD OF GOVERNORS OF; RE OPSEU; RE GROUP OF EMPLOYEES (Mar.) 515
- Certification — Petition — Practice and Procedure — Petition left at Board’s offices after office hours on terminal date — No Board staff present to accept delivery — Whether

satisfying, regulation requiring that petition be "received by" Board not later than terminal date

LILO PRODUCTS, TRYVERSE PRODUCTS LTD. C.O.B. AS.; RE TEAMSTERS UNION, LOCAL 879; RE GROUP OF EMPLOYEES (Oct.) 1469

Certification — Practice and Procedure — Employees actually working for short time on application date before being laid-off deemed to have worked on application date — Employee not working due to injury but visiting workplace "not actually at work" — Person laid-off on arrival at work deemed to have worked and included for purposes of count

HOLIDAY JUICE LTD.; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL 647 AFFILIATED WITH THE TEAMSTERS UNION (Feb.) 277

Certification — Practice and Procedure — Employees at work on application date — But having received termination notice to be effective at later date — Whether considered employees for the purposes of count

SIMPSON'S LIMITED; RE RETAIL, WHOLE AND DEPARTMENT STORE UNION; RE CANADIAN UNION OF OPERATING ENGINEERS AND GENERAL WORKERS; RE GROUP OF EMPLOYEES (Oct.) 1520

Certification — Practice and Procedure — First application dismissed restricted to maintenance employees — Second application for all support employees including maintenance dismissed — No bar imposed on dismissal of third application for similar all support employee unit

ST. JOSEPH'S HOSPITAL AT SARNIA; RE CANADIAN UNION OF OPERATING ENGINEERS AND GENERAL WORKERS (Apr.) 651

Certification — Practice and Procedure — Reconsideration — Board imposing six month bar on unsuccessful applicant — Effect of section 146(3) to prevent applicant from applying during open period of provincial agreement — Board revoking bar on reconsideration

DURON OTTAWA LTD.; RE OPERATIVE PLASTERERS UNION LOCAL 124 ET AL; RE LABOURERS UNION LOCAL 527; RE LABOURERS UNION AND ITS ONTARIO PROVINCIAL DISTRICT COUNCIL (Mar.) 448

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NORTH YORK, BOARD OF EDUCATION FOR THE CITY OF.; RE OPSEU; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION (July) 989

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FAMZ FOODS LIMITED; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES, H.E.R.E. UNION LOCAL 88; RE CANADIAN UNION OF RESTAURANT AND RELATED EMPLOYEES; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION (Dec.) 1714

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SEAFARERS' TRAINING INSTITUTE; RE SEAFARERS' INTERNATIONAL UNION OF CANADA; RE GROUP OF EMPLOYEES (Mar.) 518
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EBEL QUARRIES LIMITED; RE UNITED STEELWORKERS OF AMERICA (Sept.) 1192
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- Certification — Practice and Procedure — Union membership filed falling one short of number required for outright certification — Union withdrawing application after vote directed — Re-filing with additional card — second application not barred — But vote directed again
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- Certification Where Act Contravened — Bargaining Unit — Change in Working Conditions — Unfair Labour Practice — Evidence relating to irrelevant petition admitted to establish employer misconduct — Reduction of hours after Board notice posted unlawful — Bartenders and waiters not "salesmen" — Interim certificate issued under section 8 pending resolution of bargaining unit dispute
POLISH ALLIANCE FRIENDLY SOCIETY OF CANADA, BRANCH NO. 19, SOCIAL CLUB; RE HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 75; RE GROUP OF EMPLOYEES (Feb.) 349
- Certification Where Act Contravened — Discharge for Union Activity — Unfair Labour Practice — Employer's prima facie defence of no knowledge of union activity not rebutted by union — Discharges not unlawful — No certification without vote

IMPERIAL FLAVOURS INC.; RE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; RE GROUP OF EMPLOYEES	(Nov.)	1578
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Certification Where Act Contravened — Interference in Trade Unions — Practice and Procedure — Unfair Labour Practice — Witness — Policy reasons for non-disclosure of settlement discussions — Board not permitting calling of LRO as witness — Settlement of complaints and agreement to vote including employer undertaking to mail copies of Board notice to employees — Respondent not receiving notices in time to comply — Copies given by hand day before vote — Whether results of vote nullified — Whether employer letter indicating preference for existing employee association exceeded bounds of free speech right — Whether finding of improper threats and promises justifying certification without vote — Number of complaints settled not taken into consideration in determining s. 8 issue — New vote directed

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Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

JUL 2 1987

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